

REMARKABLE
DECISIONS
OF THE
COURT OF SESSION,

FROM
The Year 1730 to the Year 1752.

COLLECTED
BY
The Honourable HENRY HOME of Kames,
ONE OF THE SENATORS OF THE COLLEGE OF JUSTICE.

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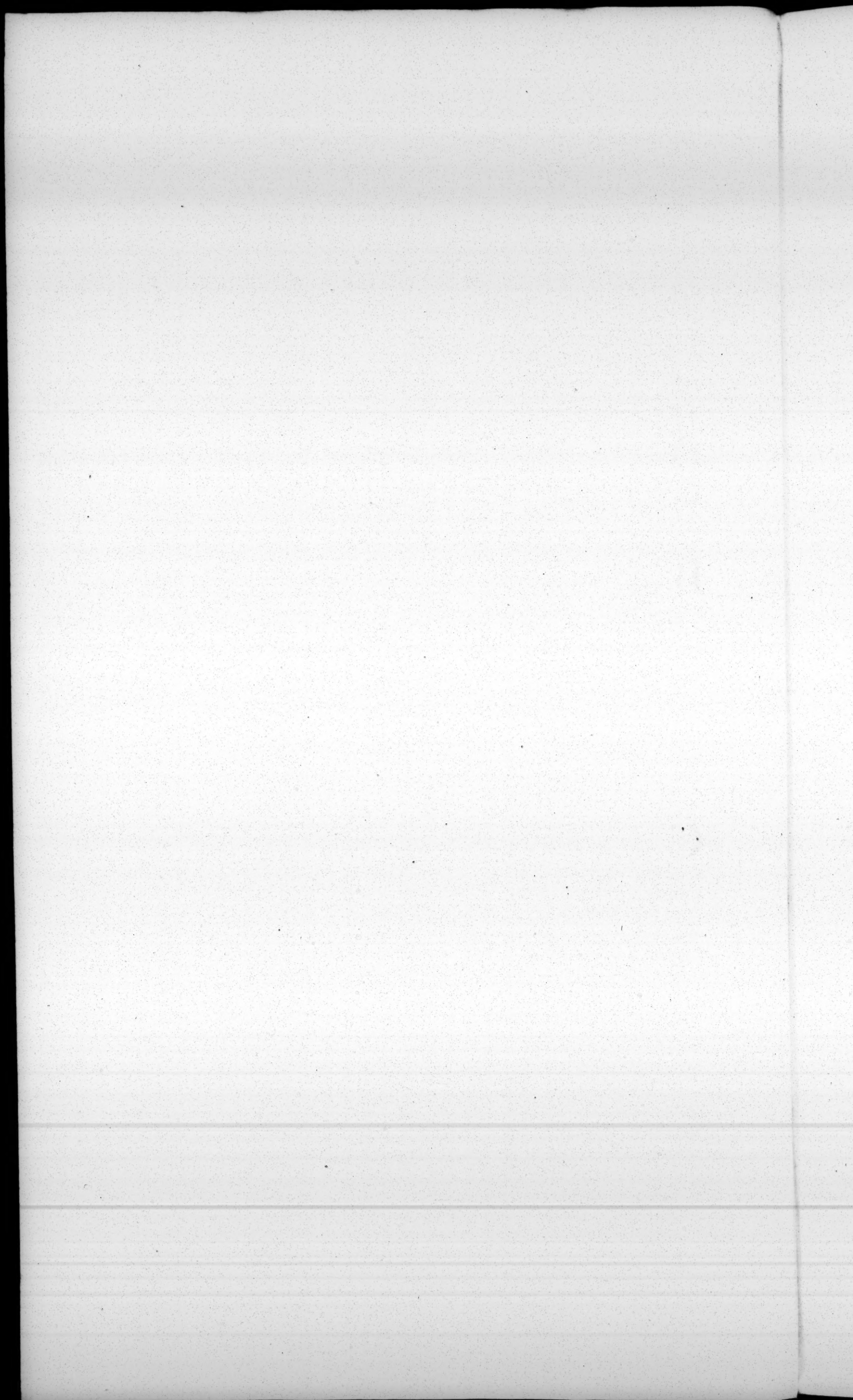
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P R E F A C E.

FOR advancing Law to a vigorous maturity, no means appear more effectual than reasonings upon general subjects, struck out in the zeal of pleading, inflamed by the spirit of interest. This consideration will always make compilations of the present kind acceptable, provided a judicious selection be made; for, to collect all cases indiscriminately that come before a Court, would have no better effect than to bury a small quantity of grain in endless heaps of chaff. The Compiler pretends not to vouch for himself; but he has empowered the Editor to say, that he has been attentive to admit no case but what, being resolvable into some principle, may serve as a rule for cases of the same kind. To pester the world with circumstantiate cases that admit not any precise or single *ratio decidendi*, is a heavy tax. It is indeed, strictly speaking, a voluntary tax, because no person is bound to purchase: but it cuts deep, however, upon a man's time, as well as his money; because curiosity and prospect of benefit will induce every one, not only to purchase, but to waste time in the perusal.

ONE word more, to inform the public, that this compilation is the performance of an Advocate, who having been employed in every one of the cases contained in the collection, had the fairest opportunity to be well informed of the *res gesta*. To vouch the accuracy of the facts, the session papers are appealed to, which, bound up in two volumes, are deposited in the Advocates Library. And as to the arguments, which were borrowed from the bench not less frequently than from the bar, every reader will judge for himself, whether they be properly adapted to the facts stated.



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R E M A R K A B L E
D E C I S I O N S
OF THE
C O U R T of S E S S I O N,

From 1730 to 1752.

N^o I.

February 1730.

CAMPBELL contra DRUMMOND.

COMPETITION.

THE estate of *Tofts* being sold at a public auction, and the decret of ranking remitted to an accountant, to make out a scheme for dividing the price among the creditors; an objection was started against the scheme, to understand which, the following facts must be premised: 1^{mo}, *Susanna Belshes* had an inhibition in the 1672, and an adjudication in the 1685, both upon the same debt. 2^{do}, *Kippenrofs* had an inhibition in the 1673, and upon the same debt, an heritable bond of corroboration anno 1679, with fasine upon it; which heritable bond consequently was struck at by the inhibition of *Susanna Belshes*. 3^{tio}, A number of annualrenters, some prior, some posterior to that of *Kippenrofs*, but all of them struck at by his inhibition. 4^{to}, A number of adjudgers in the 1685; coming in *pari passu* with the adjudication of *Susanna Belshes*, struck at by neither of the inhibitions. To reduce this case to its simplest terms with respect to *Kippenrofs*, the operation of his inhibition was first considered; which striking against the annualrenters, made his case the same as if these annualrenters were not in the field; and the inhibition itself was also laid aside, it having in this manner got its full effect. The case being reduced to its simplest terms, the ranking as to *Kippenrofs* comes out thus. *Kippenrofs's* infestment of annualrent obtains the first place. And in the second place, come the adjudgers, one of them, viz. *Susanna Belshes*, has an inhibition that strikes against the infestment of annualrent.

The question is, In what proportions is the price to be divided among these creditors? The annualrenter, in the first place, draws his whole sum; and the inhibitor draws from him, whatever he could draw were he not in the field. So far the matter is clear. But can the annualrenter recur against the adjudgers, for any share of what is thus drawn from him by the inhibition? The scheme says, no; the objector says, yes.

A

In

In order to resolve this intricate question, it must be premised, that an inhibition is not a real right, but merely a personal prohibition directed against the debtor and against the lieges, forbidding them to concur in any deed prejudicial to the inhibitor; and that consequently, it affords only a personal challenge, which does not alter or disturb the real preferences.

The nature of an inhibition being thus ascertained, the first thing to be examined with relation to the present question, is, what effect an inhibition ought to have in a ranking. Suppose three annualrenters, A, B, C, following one another in the order of time, and ranked accordingly: C, the last annualrenter, has an inhibition striking against A the first annualrenter: the estate is L. 800, and the sum in each of the annualrent-rights L. 400. Upon this supposition, A the first annualrenter is ranked *primo loco*, and draws his whole sum, viz. L. 400; which being an extinction of his annualrent-right by payment, disburdens the estate so far. B, the second annualrenter, draws all that remains, being other L. 400. And thus C, in quality of annualrenter, is cut out, and draws nothing. But then, when we consider the personal claims or objections that one creditor may have against another, we find that C, having an inhibition against A, must draw from him, by personal action or claim, whatever he would have drawn by virtue of his annualrent-right had A never existed, which is no less than his whole L. 400. And accordingly, the ultimate division comes out as follows: B gets L. 400, C 400, and A nothing. With respect to this supposed case, the objector must say, that A, to make up what was drawn from him by the inhibitor, is intitled to recur against B; which lands in giving C 400, A 400, and B nothing. And he comes at this conclusion, by conceiving that C, by virtue of his inhibition, must be ranked in the first place, A in the second place, and B in the last place. But this obviously is fallacious; for first an inhibition, as said above, gives no preference, affording only a personal challenge or ground of reduction; and next, let A and C adjust their preferences as they best can, B, the second annualrenter, against whom the inhibition strikes not, must in all events possess the second place. For to cut out B, according to the objection, is to give an extreme absurd operation to an inhibition: it is made to exclude B, though it has no cause of reduction against him; and it is made to save A, though it is against A that it strikes.

There is another case which tends to illustrate this subject. A liferentrix who has the preferable right upon the estate, consents to the preference of a creditor, which wives are frequently enticed to do: another creditor has an investment of annualrent interjected betwixt the liferent-right and the right consented to. The consent here cannot disturb the real preferences: the liferentrix must be ranked *primo loco*; the other creditor *secundo loco*, and the creditor consented to *ultimo loco*; and in that order they must draw their respective proportions, and the estate of consequence be disburdened.

ed. The creditor ranked in the last place must indeed, by virtue of the consent, draw from the liferentrix whatever he would have drawn, had the liferentrix not been in the field. But this can never intitle the liferentrix to recur against the annualrenter, ranked in the second place: as to him, the consent is *res inter alios*, which can neither hurt him or do him service.

Upon the foresaid doctrine, are built the following practical rules, which, from the time of Lord *Stair* who settled them, have been observed in all rankings. The real rights are first ranked in their order; and after their sums are allocated to them out of the price, the estate is of course disburdened of them. Next, are considered the partial challenges or reasons of reduction, that any of the creditors may have against others. As to such, the rule is, that when a preferable creditor draws his payment out of the price, he, with respect to the other real creditors, is considered as out of the field; and whatever personal challenge may be competent against him by any particular creditor, they, the other real creditors, are by no means concerned. See *Stair*, Book 4. tit. 35. § 29.

To apply this train of reasoning to the case in controversy, viz. an annualrenter and two posterior adjudgers, one of which has an inhibition striking against the annualrenter; Lord *Stair*, in the place above cited, has well fixed, that the annualrent-right must be ranked first, and the adjudications in the second place *pari passu*. Then he considers the effect of the inhibitor's personal claim against the annualrenter; but allows not the annualrenter to recur against the other adjudger for what was drawn from him by the inhibitor. The objector, on the contrary, would have the inhibiting adjudger to be ranked *primo loco*, in place of the annualrenter, because the inhibition strikes against him: he would have the annualrenter, beat out of his own place, to take up the place of the other adjudger, leaving him to be ranked *ultimo loco*.

To sum up all; when *Kippenrofs* pleads upon his inhibition, its full effect is given to it, by striking out of the ranking all the posterior infestments of annualrent: when he pleads upon his infestment, he is ranked for his whole sum; and when this sum is set apart for him, the estate is of course disburdened of the incumbrance. There is indeed a personal claim against him by virtue of an inhibition, which takes from him some share of his draught. But this inhibition militates against *Kippenrofs* solely, not against the posterior adjudgers: they cannot be in a better or worse condition than if that inhibition were not in the field.

“ Found, that *Kippenrofs's* infestment, being once ranked so as to
 “ draw his share in competition with the other real creditors,
 “ he cannot recur against the posterior real creditors for any
 “ part of what is drawn from him by *Susanna Belsbes* her inhibition.”

In a reclaiming petition, the objector endeavoured to mould his argument

argument into another shape. He pleaded according to the rule laid down by Lord *Stair*, B. 4. tit. 35. § 28. "That the adjudgers are to be accounted as joint proprietors, and the infeftments of annual-rent as servitudes on the property." Whence he drew this inference, That as it is the privilege of an annualrenter to affect any part of the ground *in solidum*, *Kippenrofs* is intitled to draw his whole sum out of the part occupied by the adjudger who has not an inhibition; nay, must do so, because he is barred from attacking the inhibiting adjudger. But the answer was obvious, *imo*, That this argument proceeds upon a fallacy, as if each adjudger possessed a separate tenement, and as if the annualrent were a burden upon both tenements; whereas, there is but one subject, *viz.* the estate of *Tofis*, over the whole of which, each adjudger has a right *pro indiviso*. This shows the emptiness of the objector's argument; for there can be no partition of the land, or of the price, betwixt the two adjudgers, till the burdens that affect the joint property, and in particular the annualrent-right, be discharged, leaving the remainder clear to be divided equally betwixt the adjudgers. *2do*, *Esto* the objector's rule were to take place, *viz.* first to divide the common subject betwixt the two adjudgers as joint proprietors; the next thing to be done, would be to divide the common burdens also; by which means no more but the one half of the annualrent-right would fall upon the simple adjudger. 'Tis true, the annualrenter might notwithstanding draw his whole sum from the simple adjudger; but then, this adjudger would, without controversy, be intitled to recover from the co-adjudger the half of the said sum, for which he, the co-adjudger, was ultimately liable. And this comes to the same with what is determined by the Court.

"The bill was refused without answers."

N^o II.

11th June 1730.

MASONS of the Lodge of *Lanerk*, contra HAMILTON, &c.

SOCIETY.

BY an act of the mason-lodge of *Lanerk*, "all members are discharged to receive, or be witness to the receiving or passing any mason within ten miles of the burgh of *Lanerk*, except the benefit come to the lodge, under the penalty of ten pound." Upon this act, process was brought against some of the members, to account for the sums they had received by apprentices and otherways, the benefit of which ought to have accrued to the lodge, and concluding L. 10 *Scots* of penalty for the contravention of the said act *toties quoties*. The defence was, that this is an unlawful society, and therefore cannot have the protection of the law; that the design of the society is evidently to enhance the business of the country, by restraining any person to pass mason, unless he pay such sums

to the lodge as the society thought fit to exact; which is contrary to the policy of the nation, disallowing of all societies, unless by particular grants or seals of cause. To this purpose, was cited act *anno 6to, Geo. Reg.* intitled, "An act for securing better powers and privileges, &c." which statutes, "That the acting or presuming to act as a body corporate, without legal authority, shall be deemed a public nuisance, and be illegal and void."

"It was found that the masons had not *personam standi*, and could not sue."

N^o III.

July 1731.

ELIZABETH MIRRIE contra POLLOCKS.

A L I M E N T.

IN a marriage-settlement, the husband obliged himself to lay out the tocher, with another sum of his own, upon good security, to himself and spouse in conjunct-fee and liferent, and to the heirs or bairns of the marriage in fee. Of this marriage there were three children, who all died without making up any title to their father's effects, whereby the succession opened to his other next of kin. The relict, who, after her husband's decease, was confirmed executrix to him, married a second time, and, after the death of her children, brought an action against the next of kin, for cognoscing the claims of debt to which she was intitled upon her husband's executry; particularly for the sums bestowed by her, out of the said funds, upon the education of her children, and upon their sickness and burials. Against this article, it was objected by the next of kin, that the whole effects left by the husband, were no more than sufficient to answer the pursuer's annuity; therefore the aliment of her infant-children was a proper burden upon herself, as being their mother, and liferentrix of their whole estate, which is provided by act of parliament in case of ward-minors, and extended by practice and analogy to other fiars.

It was answered, That the case of ward-minors is singular; and though this statute is by analogy extended to fiars of land, even this extension seems to be *invita jurisprudentia*. Sir George Mackenzie complains heavily of it, because it must have been a case in the eye of the legislature *ex proposito* omitted, and adds, "as there is not the same parity of reason, so indeed it is contrary to the faith of the marriage-contract." However this be, the law has been extended no further than to fiars of land-estates, who are great favourites in our law; the preserving of antient families being of great importance with us. Here the practice stops, and there is neither authority nor reason for extending it to fiars in moveable sums. Add, that a liferentrix of land is only obliged to aliment the heir; but, in sums of money, the bairns are generally made heirs, as happens to be the present case; so that she would have the

B

burden

burden of the whole family upon her provision; which is unreasonable.

“ The Lords found the aliment of the children, their funeral expence, and other expences bestowed upon them, may be stated by the pursuer, to affect the fee of the subjects provided to the children, if there be not sufficiency of funds otherways to pay the same.”

N^o IV.

22d November 1732.

FEUARS of *Dunfe* contra HAY of *Drummelzier*.

S E R V I T U D E.

THE village of *Dunfe*, belonging in property to *Hume of Aiton*, was, by a charter from the crown, erected into a free burgh of barony, “ with power to the inhabitants to buy and sell, to have markets and public fairs, to have burgeses who should chuse their own bailies and other officers. With power to the said burgeses and inhabitants, to have and hold the said town of *Dunfe*, with its pertinents, for ever in a true and free burgh of barony, with privileges, &c.” By a second charter, the town of *Dunfe* is again “ erected into a free burgh of barony in favour of Sir *Patrick Hume of Aiton*, with all and sundry lands, cottages, tenements, houses, yards, tofts, crofts, acres belonging to the same, with every other of its pertinents; with power to the inhabitants and free burgeses of the same, received and admitted by Sir *Patrick Hume of Aiton*, and his forefairs, to sell and buy, &c.; with power to the said Sir *Patrick* to name bailies and other officers, and of having a public market and yearly fair, and of gathering the customs and duties of the same, he always applying them to the common good of the burgh; and with power to him to admit baxters, butchers, &c.”

In a declarator of servitude of common pasturage upon the comonty of *Dunfe*, at the instance of the burgeses and inhabitants of the town, as an incorporated body, against *Alexander Hay of Drummelzier*, now proprietor of the same; a proof was admitted before answer; and it came out, that they had been in possession of the servitude past memory of man, by keeping a common town-herd, and pasturing their horse, nolt, and sheep, promiscuously over the comonty. When the proof came to be advised, the question occurred, whether a burgh of barony, *qua* such, can acquire a servitude of pasturage by prescription? Several objections and answers were made; to clear which two things were premised. *1mo*, What is the true nature of a burgh of barony. *2do*, What legal foundation there can be for such a servitude.

With respect to the first, burgage is a species of feudal holding, well known in our law; the burgh is the subject or fee held; the incorporate

corporate body of burghesses and inhabitants, hold it of a superior: where the king is superior, it is a burgh royal: where a subject is superior, it is a burgh of barony. The incorporation then, or politic body, is the *vassal* which *holds*: the burgh is the *subject* held; and, in this case, it is held of *Drummelzier* who is superior, who again holds of the crown. And here lies the difference betwixt a barony and a burgh; a barony is a feudal subject held directly and immediately by the baron as the vassal: a burgh is a complex term, comprehending the body politic of the inhabitants, and the burgh properly so called: the body politic is the vassal who holds: the burgh properly so called is the subject held, and the baron is no other than over-lord, or superior, of the politic body.

As to the second point, the possession was *nec vi, nec clam, nec precario*, which by the principles of the *Roman* law, and of ours, makes prescription in cases of servitude, as presuming a title by grant or otherways, tho' after long possession the evidence be lost. And in this a servitude of pasturage goes hand in hand with a servitude of dry multure, and with many other servitudes: long possession of a servitude of dry multure presumes a title, tho' now lost; as no man will pay dry multure voluntarily. In the present case, the immemorial possession of such a large pasturage will never be interpreted *voluntatis* of the proprietor, but *necessitatis*. In this view, prescription of a common pasturage stands upon the footing of an actual grant from the proprietor of the land: and therefore, whatever argument can be moved against the prescriptibility of such a right by an incorporation, must equally conclude, that an incorporation cannot acquire such a servitude, even by a grant from the proprietor.

A title upon long possession, is presumed from circumstances less pregnant than those mentioned. It is established, that a vassal cannot burden his fee so as to prejudice the superior: yet servitudes burdening the fee by prescription are effectual. Why? Because of the superior's consent, inferred from suffering possession for forty years without interruption. Now, if a superior's consent be presumed from a forty years possession of common pasturage upon his vassal's property, how much stronger must the presumption be when the possession is upon his own property?

It was added for the pursuers, that they have charters of their burgh of *Dunfermline*, their property, *cum pertinentibus*; which is a sufficient title to acquire even property by prescription, much more a servitude upon property.

Now, as to the particular objections in their order. And *imo*, It was objected, "That the town of *Dunfermline* is erected into a burgh of barony in favour of the baron: the burgh is his property, and any servitude acquired to the burgh, must belong to him, and not to the inhabitants to whom the burgh belongs not."

Answer: The burgh incorporated, and united into a feudal subject, held as such by the inhabitants, must be distinguished from the particular houses, yards, &c. which are the constituent parts of the burgh.

burgh. These particular houses, yards, &c. belong to *Drummelzier*; but the burgh, *qua* incorporated subject, belongs to, and is held by the body-politic; that is, it belongs to them as far as the use and possession goes, and so far only they hold it: for the feudal holding is not confined to the property of land, but is extended to burdens upon property, witness infeftments in security; and even to *jura incorporalia*, such as jurisdictions, offices, &c. This being so, nothing bars the inhabitants of *Dunse* to acquire such a servitude to their own town, as far as their interests in the town extends; just as a tacksmen may acquire a servitude to his possession, of which he has the benefit while his tack endures, and the proprietor when the tack is at an end.

Objection II. A corporation, such as that of *Dunse*, erected solely for merchandize, manufactures, &c. cannot acquire property or servitude by prescription, not being the end for which they were erected; and an example was given of the New Bank.

Answer 1. A burgh is *nomen universitatis et dignitatis*: it is a feudal holding, implying a vassal and fee; and therefore the vassal may acquire by consent or prescription, as well as any other proprietor. Thus it was found, that a burgh is equivalent to a barony, so as even to acquire salmon-fishing by prescription, 26th January 1665, heritors of *Don contra* town of *Aberdeen*; 6th December 1678, *Brown contra* town of *Kirkcudbright*: and this without any title but the town's charter, containing a clause *cum piscationibus*; upon which it was found, that such a clause granted to an incorporation, or community of a burgh, with immemorial possession, is sufficient.

Answer 2. Though *Drummelzier*, and not the incorporation, were the vassal according to the supposition, yet such an incorporation may still acquire by consent or prescription. By consent it cannot be doubted: for colleges, universities, hospitals, hold property: banks, *qua* such, are proprietors; and even this incorporation of *Dunse* holds property, having a common good as above set forth: that it can acquire by prescription, can as little be doubted, because prescription rests ultimately upon consent. Our countryman, *Craig*, foresaw no difficulty in this doctrine: In his Treatise of Feus, l. 2. *diag.* 8. § 20. treating of common pasturage, he has these words: "Hæc autem pascua vel sunt publica vel privata; pascua autem ea
" sunt publica, quæ sunt alicujus collegii aut universitatis; neque
" tamen promiscue omnibus ea permittenda, sed tantum eis qui
" sunt ejusdem collegii aut universitatis." 'Tis true, that this pasturage can only be a personal, not a real servitude. But of this hereafter.

Objection III. Pasturage is a real servitude, which presupposes a dominant as well as a servient tenement. But, in this case, the body-politic of the inhabitants of *Dunse* hold, *qua* such, no dominant tenement to support the servitude.

Answer 1. The dominant tenement is the burgh of *Dunse*, erected

cum

cum omnibus et singulis terris, cotagiis et tenementis, domibus, edificiis, hortis, toftis, croftis, acris ejusdem, et singulis aliis suis pertinent.

Answer 2. What if there were no dominant tenement? If a college, or other incorporation, can acquire such a right by consent, they may also acquire it by prescription, as above observed. Upon this supposition, indeed, it will only be a personal not a real servitude; but though a right is not a real servitude, it does not follow that it can be nothing at all. Personal servitudes, in all the different shapes that can be contrived, are received, and well known in our practice; and the instances are without number of their being acquired by prescription. "A claim was sustained, at the instance of the minister of *Leith*, against some merchants in *Edinburgh*, importers of herring, dry fish, &c. at *Leith* and *Newhaven*, to pay 20 shillings the last of herrings, and the twentieth part of killing and ling; he having proved forty years possession of the said servitude; 10th *February* 1666, Minister of *North-Leith* contra Merchants in *Edinburgh*." "One, who had some burrow-acres, refusing payment of the second minister's stipend, because he paid his whole teind to the first minister, was found liable, in regard that the heritors of the burrow-acres had been in use, past memory of man, to pay the second minister's stipend over and above the teind paid to the first minister; 22d *July* 1668, *Boswall* contra Town of *Kirkcaldy*." Again, in a process against feuars holding of a town, concluding against them to bear a proportion of the private stents of the town, "the Court sustained immemorial possession as relevant to make them liable in time coming, though their charters from the town bore a feu-duty, *pro omni alio onere*; 14th *July* 1674, Town of *Inverness* contra Feuars of *Drakies*." This case, by the bye, is extremely similar to that in hand, being a personal servitude acquired to a community by prescription. Upon the same principle, "40 years possession was found to give right to a sheriff to ride a fair, and to exact so much for the sheriff-gloves, and for the price of the best staig in the fair; 11th *July* 1672, Earl of *Callender* contra Town of *Stirling*." *Newbyth*, 10th *July* 1665, *Douglas* contra Town of *Jedburgh*. The sheriff of *Inverness* pursued a declarator, that he had right to three days salmon-fishing in the water of *Ness* under the bridge, every summer, as a casualty of his sheriffship, which was sustained upon 40 years possession; for, since this was but a servitude upon fishing, it was found it might be constitute by long possession, as sheriff-gloves and other casualties of offices are; 13th *December* 1677, Earl of *Murray* contra Town of *Inverness*. These and many more that may be given, are all of them examples of personal servitudes acquired to offices and communities, by prescription alone. At the same time, they serve as an additional answer to the second objection: here we have communities acquiring servitudes by prescription, though not the end for which they were erected; and here we have servitudes acquired to offices by prescription, though less

connected with these offices, than common pasturage is with the community of a town.

Objection IV. Supposing there were no dominant tenement, yet this real servitude cannot be acquired by prescription, not being of that nature to be *utile prædio*, which is the characteristic of a real servitude.

Answer 1. Properly speaking, no servitude is useful to the *prædium*, but to the proprietor of the *prædium*. But more directly, whatever may be the notion of the *Roman* lawyers, from whom this objection is borrowed, neither reason nor later writers are so strict in the definition of a real servitude. It is enough, if it can be a pertinent or accessory of the *prædium dominans*, so as, in the main, to make it *præciosus*. Thirlage, which is a most proper servitude, is a good example, which makes the mill *præciosus*, but in no proper sense can be said to be *utile prædio*.

Answer 2. Though the objection should be sustained to take this claim off the footing of a proper real servitude, it will still be a good personal servitude; and, if so, it must be effectual as long as the person or community subsists; and also must be effectual against purchasers; because, though but a personal servitude, it is however a real right.

Objection V. If such a servitude be sustained, it will be in explicable. The extent of real servitudes is in proportion to the extent of the dominant tenements; but here there is no dominant tenement whereby to measure the extent of this real servitude.

Answer 1. *Esto* a servitude, upon which there has been possession past memory of man, were attended with this difficulty, it will not follow that a right so well established must be cut down *in totum*: What else upon that supposition can follow, but that the pursuers should be continued in their possession as formerly. *Craig*, in the forementioned place, upon this very question, has the following words: "Si nihil in pastura constituenda cautum sit, tunc aut proportionibus fundorum quibus pascua cohærent exerceri debent; aut ex usu et consuetudine præscripta in communibus pascuis, pascendi modus potest prescribi." Here he gives his opinion, and a very just one, both where there is a dominant tenement to measure the extent of the servitude, and where there is no dominant tenement; having his eye upon the case mentioned by him immediately above, of a common pasturage belonging to a college or university, or such an one as this in dispute.

Answer 2. This servitude is by no means inexplicable, at least *quoad* the defender and the neighbouring heritors: the extent of the servitude is fully and distinctly ascertained by the proof. And therefore, were there a division of the common, by act of parliament, the pursuers would be intitled to a share of the common, in proportion to their extent proved. It is a different question, were a division to be instituted among the inhabitants themselves, What share should fall to each of them? But in this the defender has

no concern. At the same time, it is believed such a question can never occur, there being no law extant for dividing the common property or servitudes belonging to a burgh or body-politic.

“ Found that the erecting *Dunfe* into a burgh of barony doth
 “ not afford a title to acquire a servitude of pasturage by
 “ prescription. In the same cause it was found, that the in-
 “ feftment of a house, with or without a yard, is a sufficient
 “ title to prescribe a servitude of pasturage, 24th November
 “ 1732.”

Nº V.

November 1732.

CREDITORS of AUCHTERLONY competing.

JUS QUÆSITUM TERTIO.

AUCHTERLONY, before absconding for debt, made a list of his bills, which he indorsed blank, and sent the whole in a letter to *Spence* his father-in-law, bearing, that he had sent the bills to him for the use of his creditors. After the bills came into *Spence*'s hand, but before any meeting with the creditors, several of these creditors, taking the start, laid arrestments in the hands of the accepters of these bills. In a competition, the other creditors craved to be preferred, as the bills were delivered to *Spence*, their trustee, before the date of the arrestments. The arresters yielded, that a bill indorsed blank, delivered to a man for his own behoof, becomes his property; because, by such delivery, he is impowered to fill up the indorsation in his own name. But they contended, that *Spence* was trustee for *Auchterlony*, not for his creditors; that the bills remained still under the power of *Auchterlony*, since they were not delivered to his creditors, or to a trustee for his creditors; See *l. 14. § ult. de furtis*: and therefore, that the bills, as *Auchterlony*'s property, were regularly affected by the arrestments.

“ The arresters were preferred.”

Nº VI.

16th February 1734.

Earls of LOUDON and GLASGOW *contra* Lord Ross.

RIGHT IN SECURITY.

IN a ranking of the creditors of *Galston*, a question occurred among the adjudgers; to clear which, the case shall be stated in the simplest terms. Suppose two adjudgers coming in *pari passu* upon a fund in value 12, and suppose the accumulate sum in each adjudication to be 12; but that the adjudger A has recovered half of his accumulate sum out of a separate subject belonging to the debtor.

debtor. In what proportion must they divide the land in competition, or the price of the land when sold? Will the two adjudgers draw equally, in which case A will draw 6, his whole remaining claim, and B 6 the half of his claim? Or will they divide the subject in proportion to their claims presently subsisting, *viz.* in proportion of 6 to 12; by which method A will draw but 4, and B 8? In favour of the latter scheme it was pleaded, that A's adjudication, by the payment he recovered out of the separate subject, was extinguished as to the one half, and in this competition can draw no more than if it had been only led for the debt 6. On the other hand, it was contended, that the former method is founded upon the very nature of a right in security; and the train of reasoning urged in support of that method is as follows.

Suppose I obtain from my debtor a preferable security over his whole estate for payment of L. 1000: What is the nature of this right? In the first place, it is plain, that as every inch of the estate is a security for the whole debt, so every shilling of the debt is secured upon the whole estate; and that accordingly the last shilling remaining unpaid is as amply secured as the first shilling. Hence it follows, that the security does not lessen as the debt lessens, but remains the same, constant, and invariable over the whole estate, till the last shilling be paid. Another creditor, ranked *secundo loco*, cannot touch a farthing of the rents, nor of the price, till the preferable debt be wholly extinguished.

Suppose in the next place, an estate disposed to A and B *pro indiviso*, for security and payment to each of L. 1000. Each of these creditors is intitled to draw the half of what is recovered out of that estate, the half of the rents and the half of the price, so long as a shilling remains due to them; which, in other words, is saying, that A is preferable upon the one half, and B upon the other. For a man is not intitled to draw but so far as his right is exclusive, or, which is the same, is preferable: but a preference upon the half of a subject disposed *pro indiviso*, cannot take effect but by an actual division of the subject, or of the rents, or of the price; and this division being made, the result is the same as if the one half were disposed to A, and the other half to B *pro diviso*. Thus a security *pro indiviso* to two creditors, comes in effect to be the same with disposing to each a half; which resolving into the first case mentioned, must be governed by the same principles, *viz.* that each is preferable upon his own half, till he recover the last shilling of his debt, and that neither can encroach upon the other, till that last shilling be recovered.

The case of two adjudgers ranked *pari passu*, is precisely similar to that of two creditors, to whom an estate is disposed *pro indiviso*, for their security and payment. The adjudger A is preferable upon the one half, and is intitled to draw his last shilling out of it before B, the other adjudger, can come in for any share; and B is in the same condition with regard to his half. Hence it clearly follows, that

that whatever share of his debt either of the adjudgers may have received out of a separate fund, he is intitled to recover the remainder out of his own half, excluding totally the other adjudger till that remainder be fully paid up.

The mistake of those who espouse the latter scheme, lies in confounding two things that ought to be distinguished. Partial payment, they say, cuts down the adjudication *pro tanto*. If they mean the debt in the adjudication, they are in the right; but if they mean the adjudication, or the real right by which the debt is secured, they are undoubtedly in the wrong. The real right acquired by adjudging, is not a fluctuating security, lessening by degrees, and becoming narrower and narrower in proportion as the sum secured is lessened by partial payments. On the contrary, the real security once established, continues unvariably the same, not less extensive for drawing the last moiety, than it was originally when the security was constituted.

It is true indeed, that, in a competition of adjudgers ranked *pari passu*, a payment made before leading an adjudication, must have an effect to limit the real security. For though these co-adjudgers, whether their debts be great or small, are preferable upon the whole subjects adjudged, and are intitled to draw the last shilling of their debts before admitting to any share, the extraneous creditors who are ranked *secundo loco*; yet, in a competition among the co-adjudgers themselves, each draws in proportion to the extent of the sum adjudged for; which is in other words, saying, that his real security is commensurate with that sum. But though the real security by adjudication, be commensurate with the debt adjudged for; yet the real right, once established to that extent, continues unvariably the same till the last farthing be recovered.

“ Found, that the adjudger, who had recovered the partial payment out of the debtor’s separate funds, ought, notwithstanding, to be ranked for the whole sum in his adjudication *pari passu* with the other adjudgers, in order to recover payment of the remainder.”

N^o VII.

17th February 1736.

ANNE MURRAY CONTRA CREDITORS OF PILMURE.

HEIR CUM BENEFICIO.

AN heir entering *cum beneficio inventarii*, brought an action for ascertaining the value of the land, concluding that the creditors, upon receiving that value, ought to disincumber the estate of their debts and diligences. On the other hand, the real creditors, who were infest during the predecessor’s life, insisted in a process of sale of the estate upon the statute 1681. These processes being

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conjoined,

conjoined, the defences made by the heir, were, *imo*, That, by the statute introducing the benefit of inventory, a privilege is given to the heir, to hold the estate upon payment of the value: the value comes in place of the estate: and when that value is made good to the creditors, they must disburden the estate of their whole debts, because they cannot have both the estate and the value. And to fortify this defence, it was urged, that upon an entry *cum beneficio*, the debts due by the defunct are *ipso jure* extinguished so far as they exceed the value; to which extent, and no further, the heir is liable. *2do*, There is no foundation for a sale of the estate upon any of the acts of parliament, seeing the heir, who is now proprietor, neither is nor can be bankrupt.

To the first, *answered*, The statute introducing the benefit of inventory, has only in view to protect the heir from an universal passive title, declaring that he shall not be personally liable beyond the value of the estate. From this indeed it follows, that if the creditors chuse to sue the heir for payment, they must accept the value, because the heir is no further liable personally; and if they receive the value, the estate must be disburdened of course. But if they forbear personal execution, the statute does not say nor insinuate, that the creditors are bound to accept this value. This is left to be determined by the common rules of law: and when that is the case, what room is there for maintaining, that a service with an inventory, can give the heir a more ample and unlimited right to the estate, than a service without an inventory? The infestments granted to the creditors, were burdens upon the predecessor's estate; and the heir serving, with or without inventory, takes the subject *tantum et tale* as it was in the predecessor, burdened with the real debts. The debts once established upon the estate must subsist until payment of the last shilling; unless the estate be brought to a public sale; which is the single case known in law, where a real creditor is bound to accept a proportion of the price. In short, the heir is put upon no better footing by the statute, than a debtor is, who has obtained from his creditors a discharge of personal execution, or than one is, who has a decree of *cessio bonorum*, or has the *beneficium competentiae*. 'Tis very true, the debts are restricted *quoad* the heir, he having, from the statute, a privilege of exception, to be free from personal execution upon paying the value. But this is perfectly consistent with his being *ipso jure* liable, which he is by representation: a personal exception against payment supposes the debts due; but to be free *ipso jure*, is saying, that there never was a debt, or that it is now extinguished. The defender's doctrine would go hard with real creditors: if the debts, real as well as personal, be extinguished *ipso jure* so far as they exceed the value, the estate must always be sufficient to pay the remainder; which would be a monstrous injustice, by putting personal creditors upon an equal footing with those that are real. Beside, what becomes of the moveables upon this supposition? These must always be free to the

next

next of kin, whatever become of the creditors. Nothing can be more absurd.

To the second, *answered, 1mo*, The heir who enteres *cum beneficio* to an overburdened estate, is in the strictest sense of law bankrupt; for he is liable *ipso jure* to the whole debts, though he has a privilege to defend his person. *2do*, *Esso* the heir were free *ipso jure*, that would not bar a sale. Let us suppose one purchases an estate, with a real incumbrance upon it, near the value: he is not personally liable to this incumbrance; and yet, if his proper debts exhaust the remainder, the real creditor may insist in a sale. Or suppose a man accepts a disposition with the burden of the granter's debts, which afterward are found to exhaust the value; can it be doubted, that any of these creditors, after leading an adjudication, may proceed to a sale, though the debtor cannot be said to be bankrupt, when possibly he is not owing a shilling in the world? it is sufficient that the estate is bankrupt. And *3tio*, Did there arise any doubt here upon the words of the bankrupt-statutes, it would be a defect, which the Court of Session would supply from the spirit and meaning of these statutes. And indeed, why not a sale in this case, if it can be shown rather more necessary than in any other case that can be figured? personal execution, which is a strong spur to the debtor, is wanting here; and there is the more necessity for other execution to supply that defect. And truly, it must appear exceeding strange to suffer an estate to lie *in medio* for ever, leaving the creditors without hopes of payment, when the price might be sufficient to discharge the whole debts, and possibly some reversion to the proprietor.

The Lords gave this question first for the creditors. But afterward, upon a reclaiming petition and answers, it was found, upon the President's casting vote, "That the creditors have no right to bring the estate to a sale; and that the heir is only liable to the creditors for the value of the estate as it shall be proved."

Upon the authority of this case, several processes were brought at the instance of heirs served *cum beneficio*, and the Court beginning to demur upon the relevancy, the case was ordained to be pleaded in presence. And, upon 12th July 1738, "They found, the creditors have a right to bring the estate to a sale; and that they are not bound to accept the sum that the estate may be valued at upon proof." The heirs of Sir Patrick Strachan of Glenkindy contra his Creditors.

N^o VIII.

22d June 1737.

BELL of Blackwoodhouse contra JOHN GARTHSHORE Merchant in Glasgow.

COMPETITION.

CHATTO having purchased an estate at a public sale, extracted his decree of sale; and, without infecting himself, he conveyed the

the same to *Bell* of *Blackwoodhouse*. Thereafter, *John Garthshore*, creditor to the said *Cbatto*, adjudged from him the decree of sale with the lands; and being infest upon his adjudication, his was the first completed real right.

In a competition between them about the mails and duties, it was *pleaded* for *Bell*, That, by the conveyance to him, *Cbatto* was *funditus* denuded of his personal right; and that nothing was left with *Cbatto* to be carried by *Garthshore's* adjudication. And to show that this is law, the decision, *Rule contra Purdie*, was cited, with many of a later date, all combining to support a proposition that has governed our practice many years as an indisputable rule of law, *viz.* That a disposition to land without infestment, is transferred *funditus* from the disponent to the disponent, by a simple disposition, without other solemnity.

It was *pleaded* for *Garthshore*, That he stands infest in the subject, having followed out the whole solemnities of the law of *Scotland* necessary to establish the feudal-right in him; and if his right, or the right of those who may purchase from him, can be defeated by a latent disposition granted by his author, purchases in *Scotland* will not be more secure than in a neighbouring country, where no records are kept of land-rights and conveyances. This case therefore deserves to be thoroughly weighed; and to that end, the following observations are offered.

1^{mo}, As consent alone transfers not property, delivery is a necessary solemnity for that end: actual delivery, where the subject is moveable; symbolical delivery, where it is immoveable.

2^{do}, A disposition of land with procuratory and precept, imports no more but the granter's consent in favour of the disponent, and a mandate or order to deliver the subject to him. Before *fasine*, which is the symbolical delivery, the disponent is not proprietor, nor is the disponent divested of his property.

3^{tio}, Supposing the same land to be disposed, with procuratory and precept, to two or three different purchasers, an opportunity is given to each of them to acquire the property; but he only among them becomes proprietor who first obtains infestment. This solemnity transfers the property, and of course extinguishes the disponent's property, with all the personal rights founded upon it.

4^{to}, In this supposed case, the several purchasers have each of them the proprietor's consent to convey his property to him; and each is intitled to have the land delivered to him, which leaves it in the bailie's power to give delivery to any one of them he thinks proper.

5^{to}, Of a disposition granted to a man and his assignees, the meaning is, that *fasine* may be given either to the man or his assignee. When therefore a disponent assigns his personal right, the assignee is intitled to demand delivery; which, at the same time, bars not the disponent himself to demand delivery; and he of the two who

is first infeft becomes proprietor, precisely as in the former case of several dispositions granted by the same proprietor.

This evinces that a procuratory and a precept are in their nature ALTERNATIVE, being a mandate or order to give delivery to the disponent himself, or to any having his consent. And, when delivery is made to one or other, the property must of course be transferred to that person to whom delivery is made, because in him concur the consent of the proprietor with delivery, all that is necessary, by the principles of law, to transfer property.

The rule, that a personal conveyance denudes of a personal right, seems to proceed from an error in law, as if an assignment to a disposition containing procuratory and precept did necessarily denude the cedent, so as to make it no longer lawful to deliver the subject to him, but only to the assignee. And were this so, it behoved to support the doctrine in all its consequences; for if the disponent himself be no longer intitled to demand delivery, it must be yielded, that neither can he intitle any other to demand it: that no person can give what he has not, is a clear principle in philosophy, as well as in law.

But that a conveyance of a disposition containing procuratory or precept has no such effect, appears not only from what is said above, but is confirmed, past all doubt, from an established practice admitted by all to be effectual in law; which is, that after conveyance of a procuratory or precept, the assignee commonly infefts his author, and then infefts himself. Is this practice consistent with the rule, that a personal conveyance denudes of a personal right? Certainly not; for, if the disponent were *funditus* denuded of his personal right, by conveying it to another, his case would become the same as if the right never had been in him; and consequently, so fine given to him would not be more effectual, than if given to *John a Groat*. But, upon supposition that a procuratory or precept is a mandate or order in its nature alternative, empowering delivery to be made to the disponent, or to any other having his consent, the said practice is perfectly consistent; because delivery to either is good in law.

This acknowledged power which an assignee has to infeft his author, puts an end to the dispute. If a disponent, even after assigning the procuratory and precept, can be legally infeft, it must follow, that the power to receive delivery continues still with him, which is all that is requisite to validate a second assignment; for while the power of receiving delivery remains with the disponent, his consent to another's receiving it must be effectual. And if he make twenty assignments, they are equivalent to so many dispositions granted by the proprietor himself: the person first infeft must carry the real right; for a plain reason, that the order is alternative, to give infeftment to the disponent, or any other person having his consent.

And in this matter, the conveyance of real rights goes hand in hand with the conveyance of personal rights. An assignment to a

bond, denudes not the cedent till the assignment be intimated: why then should an assignment to a disposition without further, denude the cedent? Can it be thought, that a disposition to land is transmissible with less solemnity than a simple personal bond? But, to carry on the comparison, a case in personal rights shall be figured precisely similar to the present: an assignee to a bond, without intimating, makes two several conveyances; and the last conveyance is first intimated: it was never doubted, that the first intimation gives right to the bond. Here then we have it established, that a personal conveyance denudes not even of a personal assignment to a bond; and as little ought it to denude of a disposition to land. At the same time, the supposed case serves finely to illustrate the case in hand: an assignee to a bond, without intimating, conveys his right to several purchasers: each of them is equally intitled to take the proper steps for establishing the subject in his person; they are like so many creditors *in cursu diligentia*, the first completed diligence carries the subject.

Having made out, that *Bell's* ground of preference is not supported by the principles of law, the next step shall be to inquire into the consequences that may result from it, particularly with respect to the records.

Probably the rule of a personal conveyance denuding of a personal right, has been introduced with respect to those cases where the rights in competition remain personal; and has inadvertently been extended to infeftments proceeding from a common author not infeft. And, were it to have no further operation, the harm would not be great, however erroneous the rule may be; for men would be put on their guard, not to purchase but from one infeft. But the matter cannot rest here; for it shall be made evident, that, by this rule, there is as little security in purchasing from one infeft as from one not infeft.

The cases that hitherto have been brought before the Court are, all of them, like the present, between purchasers where the common author was not infeft. But let us suppose, that *Garthshore*, after being infeft, had sold the land, and that the competition were between *Bell* and the purchaser; it is extremely obvious, that, if *Chatto*, the common author, was *funditus* denuded by his conveyance to *Bell*, the posterior conveyance from *Chatto* in favour of *Garthshore*, must be void as flowing *a non habente potestatem*; that this void right cannot be validated merely by taking infeftment; and that a purchaser from *Garthshore* would be in no better condition, *quia nemo dare potest quod ipse non habet*. The purchaser, therefore, in this supposed case, acquiring *a non domino*, could not be secure otherwise than by the positive prescription. Thus then it comes out clear, that, in making a purchase of a land-estate, no man by this rule can have any security from the records, if there happen to be in the whole progress but a single author who was never infeft; for there
may

may be a latent conveyance from this author, which cannot be discovered from the records.

But the mischief spreads still more wide; for, *if* every one of the authors had been infest, there remains the same uncertainty: one must have a disposition before he can be infest; and who knows, whether, before his infestment, he has not denuded himself by some latent conveyance: if so, his infestment is void as well as the titles of those who purchase from him.

No answer can be made for obviating such pernicious consequences, if it be not this, "That one who purchases from a person infest, is secure, because he purchases upon the faith of the record." But where is the law, that declares a purchaser to be secure against every latent claim which appears not upon the face of the records? We have no such law; and many cases may be figured where our records are defective, and give us no security. Our statutes have made a provision with respect to certain deeds, that they must be put upon record, under certification, that otherwise they shall not be effectual against purchasers, such as *saftines*, *reversions*, &c. with respect to which, the records make us absolutely secure. But there are many deeds, in their nature good against purchasers, which are not appointed to be recorded; and there are others that admit not of being recorded.

And to show, that, by the legislature itself, the records are not held to be an absolute security, I appeal to the statutes concerning prescription. What use would there be for the vicennial prescription of *retours*, if a purchase from a younger brother served heir to his father were secure by the records, which cannot inform the purchaser that there is an elder brother existing? And, if such purchaser be not rendered secure till after the lapse of twenty years, is not this in effect saying, that the records give him no security in this case? There would be as little use for the positive prescription of forty years; the obvious purpose of which is, to shut the door against every latent claim that otherwise would affect purchasers, though not appearing upon the face of the records. This makes it evident, that a purchaser from a person infest, is secure against no grounds of challenge that are in their nature good against purchasers, but such only as are appointed to be recorded. A latent conveyance, by a person not infest, is none of these grounds of challenge that are appointed to be recorded; and therefore, supposing such a latent conveyance to be good in its nature against a purchaser, the records will not secure him, nor any thing else, but the positive prescription of forty years.

When thus stands the law, it is mere amusement to imagine, that in every case we have security from the records. Hitherto it has been reckoned, that if a purchaser search the records for forty or fifty years backward, he is in safety to pay his money. But how lame must a purchaser's security now appear, when possibly the very day before infestment, his author may have conveyed away
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his personal right? In vain, after this, will any person attempt to magnify the security of the records.

With respect to the many decisions urged on the other side, the following observation was made. The first of them, *viz. Rule contra Purdie*, stands upon a sandy foundation: the decision, *Deuar contra French*, was pleaded as a strong authority in that case; and yet when we look into the decision, *Deuar contra French*, as compiled by Lord Fountainhall, December 1695, it proves the direct contrary. The case was this: "In a competition betwixt two adjudgers, the common debtor's right being a disposition with procuratory and precept, but no infeftment, the first adjudger pleaded preference; his adjudication, which denuded the debtor of his personal right, being the first complete or effectual, and the other adjudger was not within year and day. It was urged for the other adjudger, that his was the first complete and perfected right; for, after having adjudged the disposition, he proceeded to take infeftment upon the precept therein contained. The Lords brought them *in pari passu*." This was in effect finding the last adjudication the first effectual, upon this medium, that the common debtor was not denuded by the first legal conveyance without infeftment, but that the second legal conveyance, upon which the first infeftment followed, was preferable; which is the very point pleaded for *Garthshore*, and is directly contrary to the decision *Rule contra Purdie*. It comes out then, that this decision, which is the first that tends to establish *Bell's* doctrine, is founded upon a mistaken authority. And the later decisions have proceeded upon the same mistake, without advertent to the fatal consequences. At the same time, it must appear of great weight, that, from the first traces we have of our law down to the 1710, we find no support to this doctrine from any sort of precedent or authority: on the contrary, as the opportunities of pleading it must have been frequent, it is convincing evidence of its being disregarded by our judges and lawyers, that we find not any person putting in his claim upon it, save once in a decision compiled by the Lord Stair, 20th June 1676, *Brown contra Smith*; where a purchaser of land, having a disposition with a procuratory and precept, first gave an heritable bond for a sum of money, and then sold the land to a third party, assigning the procuratory, upon which the purchaser was infeft. "The Lords found the purchaser preferable to the creditor, upon this medium, that an assignment to an incomplete real right, though it had been directly done and intimate, could have no effect against a purchaser completing his right by infeftment." This is the footing the Court went upon, if we can give faith to Lord Stair.

But, above all, we have the sense of the legislature itself against this doctrine. Had it ever been dreamed, that a latent disposition may be such an impediment in the commerce of land, or other heritable subject, as is pretended, it is not supposable that our legislature, in establishing the records, would have totally neglected this impediment.

impediment. After appointing fadnes and reversion to be put upon record, nay even the smallest eiks to reversion, discharges, renunciations, &c. it would have been great blindness to overlook latent dispositions, more dangerous to purchasers than all the former joined together. This may justly be held an authority against the rule, indirect indeed, but little less weighty than an express act of parliament.

The Court, in this case, abstracting from all specialities, pronounced an interlocutor in favour of the personal right, led by the weight of former decisions. But, upon a reclaiming petition with answers, a hearing in presence, and informations, they “ preferred *Garthshore’s* real right, and refused a petition against this interlocutor “ without answers.”

N^o IX.

24th June 1737

JAMES MITCHEL *contra* MITCHEL of *Blairgorts*.

E X E C U T O R.

PATRICK MITCHEL being creditor, as well as next of kin, to his brother *James Mitchel*, did, upon *James’s* decease, confirm himself executor-creditor; and, among other subjects, gave up, in inventory, a bond of 2000 merks due to the deceased; which bond he thereafter assigned to *Mitchel of Blairgorts*, but died without executing the testament.

James Mitchel, by the death of his father *Patrick*, came to be next of kin to *James Mitchel*, the original creditor in the said bond; and a creditor of his, apprehending that *Patrick Mitchel’s* confirmation had become void by his death, seeing the money was neither levied by him nor his assignee, nor decree taken in their name, did, upon the act 41. parl. 1695, obtain himself confirmed executor-dative to *James Mitchel* the said original creditor; upon which a question arose betwixt him and *Patrick Mitchel’s* assignee, which of them had best right to the said bond. The executor-dative appealed to the authority of Lord *Stair*, tit. Executry, § 61. In answer to which, the assignee contended, that a confirmation by an executor-creditor, or *qua* next of kin, doth so far vest and establish the subjects in the person of the executor, that there never can be place thereafter for a second confirmation of these subjects, as *in hereditate jacente* of the first defunct.

Upon this point of law, it was yielded for the assignee, that executry is but an office, and *qua* such can never be a *causa transferendi domini*; that indeed, when an executor-dative obtains payment, the money becomes his property, being delivered as a *species* not as a *corpus*; and that when he discharges a debt, taking a new bond in his own name *tanquam quilibet*, the bond is his property, because the

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discharge

discharge makes him liable as if he had received payment in specie; but that, if the executor-dative die before execution, the trust, so far as not fulfilled, must die with him, which requires the nomination of a new trustee by a confirmation *ad non executam*; and this is the sum of what Lord *Stair* lays down in the passage above quoted. The assignee at the same time contended, that an executor-creditor or *qua* next of kin, is in a different condition. It is said by Lord *Stair*, tit. *Executry*, § 51. with regard to the interest of the next of kin, that confirmation is *aditio hæreditatis in mobilibus*, whereby their title is completed, whoever be confirmed. Now, where the next of kin himself is confirmed, though the confirmation constitutes him only executor or trustee, for the behoof of creditors and of others having interest, which can never be a title of property; yet it must be considered, that this trust is partly for behoof of the trustee himself. And therefore, taking his confirmation as a procuratory *in rem suam*, it must subsist until the uses and purposes for which it was granted be fulfilled; for this evident reason, that such a procuratory falls not by the death of the person to whom it is granted, especially when granted by the law, which never dies. A confirmation, accordingly, of the next of kin, or of a creditor, cannot fall by their death, but may be taken up and executed by their representatives confirming to them; which must for ever exclude a new confirmation of the same subjects, as *in bonis primi defuncti*; for our law admits not the nomination of a second executor or trustee, while a prior confirmation is in force; and therefore, if the first confirmation subsist after the executor's death, to be executed by his representatives, there can be no place for a new confirmation of the same subjects, more than if the executor were still alive. It was contended, 2^{do}, *Esto* a confirmation *ad non executam* could have place in this case, it would carry nothing but the naked office and *jus exigendi* for the behoof of the deceased executor's representatives or assignees. 3^{tio}, This being so, the confirmation upon the act 1695, is null and inept; seeing, by the intendment of that statute, such a confirmation, calculated solely for the benefit of creditors, can never proceed where nothing can be carried by it but the naked office.

“ Found, that *Patrick Mitchel* having confirmed the 2000 merks
 “ and interest, as creditor to his brother *James*, to whom he was
 “ next of kin, the property thereof belonged to *Patrick* from
 “ the time of the confirmation; and that he might habily
 “ assign the same. Found the confirmation of *James Mitchel*,
 “ as executor-creditor *quoad non executam*, was inept and void;
 “ and therefore found *Blairgorts* the assignee preferable.”

N° X.

20th June 1739.

CREDITORS of BROUGHTON *contra* GORDON.

PERSONAL and REAL.

SIR *David Murray*, in the marriage-contract of his eldest son *Alexander*, disposed to him the estate of *Stanhope*, with the following clause in the procuratory of resignation: "And further, it is hereby expressly provided and declared, and shall be provided and declared in the charter and infeftments to follow hereon, that these presents are granted in favours of the said *Alexander Murray*, and the lands, baronies, tenandries, and others therein mentioned, are resigned with express burthen of payment to the said Sir *David Murray* his creditors, of the haill debts and sums of money due by him to them, and contained in a particular list and inventory of the said debts; as also, with the burden of payment to the said Sir *David's* children, of the respective provisions and portions granted by the said Sir *David* to them, all particularly set down in the foresaid list and inventory subscribed by the saids Sir *David* and *Alexander Murrays* of the date of thir presents." And this list was recorded in the books of Session.

Sir *Alexander* the son sold the estate, which produced a multiple-pounding by the purchaser, as debtor for the price, and a competition of creditors: and Mr *Robert Gordon*, having right by progress to the provision of one of Sir *David's* daughters, which was ingrossed in the list with Sir *David's* other debts, claimed preference for the following reason; that though a general burden of debts is now no longer sustained as a real burden, yet that the burden in this case was made special by reference to the list of debts, which was put upon record. And, with regard to the children's provisions, it was separately urged, that the names and number of these children being notorious, it was easy for the purchaser to purge the estate of those provisions, even without aid of the list: that a disposition, with the burden of all debts in general due to a person named, would be deemed a special burden, because a reduction and improbation could force that person to condescend upon the debts due to him; and that the present case, with regard to Sir *David's* children, is in effect the same.

"Found, that the clause in the contract of marriage, burdening the lands, baronies, &c. with the payment of Sir *David Murray's* debts, contained in a particular list and inventory thereof, neither expressed in the contract of marriage aforesaid, nor registred in the register of sasines and reversions, does not render the debts in question a real burden upon the lands conveyed by Sir *David Murray* to his son *Alexander*, by the said contract of marriage."

N° XI.

N^o XI.

December 1739.

CREDITORS OF KIRKCONNEL Competing.

C O M P E T I T I O N.

JOHN GORDON purchased the lands of *Kirkconnel* at a public sale; and, before he himself was infest upon his decret of sale, granted several heritable bonds, upon which the creditors took infestment at different times. In a competition of his creditors, it was pleaded for the latest annualrenters, that the annualrent-rights, being originally ineffectual as to any real right upon the land, were validated by the common debtor's infestment, and no sooner; and therefore, that they ought all to be ranked *pari passu*; as no creditor can maintain that his real right is of an earlier date than that of his competitor.

"The Court, notwithstanding, preferred the creditors according
 "to the dates of their infestments, in the same manner as when
 "granted by a debtor infest."

N^o XII.

4th January 1740.

BROWN of *Glaswell* contra FLETCHER.

T H I R L A G E.

FLETCHER having abstracted his corns from the mill of *Glaswell*, *Brown* the proprietor of the mill, brought a declarator of astrictio, with a separate conclusion against the tenants of *Ballinsho* for mill-services. A proof being admitted before answer, the pursuer brought sufficient evidence, that the possessors of *Ballinsho* had, as far back as could be remembered, frequented the mill of *Glaswell*, with all the corns they had occasion to grind, paying in-town-multure; the mill-master, on the other hand, carrying their corns to the mill, and furnishing them sieve, riddle and canvas, beside entertainment. There were also several tacks produced by the proprietors of *Ballinsho*, taking tenants bound to frequent the mill. But no evidence was brought of the mill-services.

At advising this proof, the defender relied upon the opinion of *Craig*, lib. 2. diag. 8. § 7; of *Stair*, B. 2. tit. 7. § 17.; and the authority of several decisions concurring, that the immemorial use of frequenting a mill, and of paying in-town-multure, is not sufficient to constitute a servitude of thirlage. The pursuer did not controvert this principle, but observed, that, what was sufficient to constitute a thirlage, and what was a sufficient presumptive evidence of such a constitution, were different points; that *Craig* and *Stair*, in the cited

ted passages, treat only of the former ; whereas the latter is the present case. The pursuer and his authors were all infest in the mill *cum multuris usitat. et consuet.* which is evidence that some lands have been thirled. And what better explanation can there be of a general clause, than immemorial possession of the multures of *Ballinsbo* ; which is presumptive evidence, of the strongest kind, that the lands of *Ballinsbo* were meant in the several infestments.

“ The Lords found there is sufficient proof of the astringency of the
 “ grindable corns growing upon the defender’s lands, to the
 “ pursuer’s mill, for payment of the multure and knaveship
 “ therein specified ; upon the mill-master’s carrying the tenant’s
 “ corns to the mill, and giving them sieve, riddle, and canvas,
 “ and entertainment during the time they are labouring their
 “ corns. But that the tenants are not liable to bring home the
 “ mill-stones, clean the mill-dam, repair the mill nor mill-
 “ houses, nor to perform any other service.”

N^o XIII.

13th June 1740.

WILLIAM CAMPBELL *contra* His Sister, and Mr M’MILLAN her Husband.

SUBSTITUTE AND CONDITIONAL INSTITUTE.

JOHAN CAMPBELL, Provost of *Edinburgh*, in July 1734, executed a general disposition of the whole effects that should belong to him the time of his death, to *William* his eldest son, with the burden of provisions to his other children, *Matthew*, *Daniel*, and *Margaret*. *Daniel*, one of the younger sons, being at sea, in a voyage from the *East-Indies*, made his will, May 1739, in which he “ gives and be-
 “ queaths all his goods, money, and effects, to *John Campbell* his fa-
 “ ther ; and, in case of *John*’s decease, to his beloved sister *Margaret*
 “ *Campbell*.” The testator died at sea, in the same month of *May* ; and, in *June* following, *John Campbell*, the father, also died, without hearing of *Daniel*’s death, or of the will made by him. *William*, the eldest, brought an action against his sister *Margaret* and her husband, concluding that it should be found and declared, that the substitution in favour of *Margaret*, contained in *Daniel*’s testament, was in effect but a conditional institution ; and therefore, that she had no claim ; because, by the father’s survivance, *Daniel*’s effects were vested in him, and consequently were regulated by the father’s deed of settlement.

To support this conclusion, the authority of the *Roman* law was urged, and the rule there laid down, That *in dubio*, the *substitutio vulgaris* is understood, which takes not place if the institute survive the testator.

On the other hand, it was pleaded for the defenders, That our
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law differs widely from that of the *Romans* in the case of substitutions. The idea of property was antiently more limited than at present: a man could dispose of his effects by a deed *inter vivos*, and also by a testament; but it was not supposed that property, however absolute, could empower one to make a settlement for his heir, to take place, even after that heir is vested in the full property: and indeed it is a wide stretch to admit such an extensive privilege. Thus it was a maxim in the *Roman* law, That no man can name an heir to his heir; which is, in other words, that no man can make a proper substitution. Such a settlement was indeed sustained, if the heir died under age, before he had capacity to make a testament for himself, which was called the pupillar substitution. So standing the law of the *Romans*, every settlement of the present nature, must by them be understood a vulgar substitution, which is, in other words, a conditional institution; for an extreme good reason, that it could have no further effect. But the case is widely different with us. By the law of *Scotland*, it is understood to be a power inherent in every proprietor, not only to name his own heir, but to name heirs to his heir, without end, in a tailzie or proper substitution. In the *Roman* law, there was no room for a *quæstio voluntatis*: a proper substitution, had such a thing been intended, would have been void for want of power. With us there is no defect of power, and so the matter resolves into a *quæstio voluntatis*, whether was it *Daniel's* intention, in case of the surivance of his father the institute, to prefer his beloved sister *Margaret* before his brother *William*? With regard to which there can be no difficulty; because the same reason that led him to prefer his sister, in case of his father's predecease, must have led him to prefer her in case of his father's surivance.

“ Found, that the substitution in favour of the defender *Margaret*,
 “ in her brother *Daniel's* will, does subsist; notwithstanding the
 “ institute *John Campbell* did survive the testator.”

Nº XIV.

13th June 1740.

WILLIAM CAMPBELL *contra* His SISTER, &c.

P R E S U M P T I O N.

JOHN CAMPBELL, Povost of *Edinburgh*, in *July 1734*, executed a general disposition of the whole effects that should belong to him the time of his death, to *William* his eldest son, with the burden of provisions to his other children *Matthew*, *Daniel*, and *Margaret*. *Daniel*, one of the younger sons, being at sea in a voyage from the *East-Indies*, made his will, *May 1739*, in which he “ gives
 “ and bequeaths all his goods, money, and effects, to *John Campbell*
 “ his father; and, in case of *John's* decease, to his beloved sister
 “ *Margaret*

"*Margaret Campbell.*" The testator died at sea, in the same month of May; and, in June following, *John Campbell* the father also died, without hearing of *Daniel's* death, or of the will made by him. *William*, the eldest, brought an action against his sister *Margaret* and her husband, containing, amongst other conclusions, that, by his father's survivance, *Daniel's* effects were vested in the father, and descended to him the pursuer, by the father's disposition in his favours; by which the substitution in favour of *Margaret*, contained in *Daniel's* will, was altered, supposing it to be a proper substitution.

To support this conclusion, the father's settlement was appealed to, disposing to the pursuer, in express terms, all the effects that should belong to him the time of his decease; which included, among other subjects, the effects that formerly belonged to *Daniel*, and which vested in the father by his survivance.

It was answered, That nothing more was intended by the Provost than to settle upon his eldest son his proper effects, which, but for that deed of settlement, would have descended to his heirs *ab intestato*; that there is nothing in the tenor of the deed of settlement, or in the circumstances of the parties, upon which to presume that the father intended to void the substitution, had he even known of it at the time: but his ignorance of the substitution, removes all suspicion of his having any will about the matter, secret or revealed: consequently, that the case resolves into the following question, whether *Daniel's* effects must be carried by the mere force of the words in the father's settlement? which must be answered in the negative; because, though the words are general and sufficiently ample, yet words alone, without intention, have no operation in law; and, with respect to the father's intention, it certainly goes no farther than to provide to his eldest son what would otherwise have fallen to his heirs *ab intestato*.

" Found, that the general disposition in the 1734, granted by *John Campbell* to his son the pursuer, several years before *Daniel's* will had a being, does not evacuate the substitution in the said will, but that the same does still subsist."

N^o XV.

25th November 1740.

Earl of DARNLEY *contra* CAMPBELL of Shawfield.

TACIT RELOCATION.

IN the 1706, *Edward Hyde*, eldest son to Lord Cornbury, obtained from Queen Anne a lease for three nineteen years of the feu-duties of the isle of *Ilay*, of value L. 500 *Sterling* yearly, for an annual payment of L. 500 *Scots* to the crown. *Campbell* of *Shawfield*, as proprietor of the island, being liable personally for these feu-duties, obtained

obtained from the Earl of *Darnley*, in the right of the said *Edward Hyde*, tacks of the feu-duties for payment of L. 300 Sterling to the Earl, and relieving him of the yearly sum of L. 500 *Scots*, payable to the crown. The last tack was granted in *May* 1737, to endure from *Whitsunday* 1737 to *Whitsunday* 1738. The tack-duties were regularly paid for that year; after which there was an interruption for two years, the Earl having gone abroad without leaving powers to call for his rent. At the next counting, the Earl insisted for the full feu-duties, payable by *Shawfield* as proprietor. *Shawfield* answered, That he had the benefit of tacit relocation, and was liable only for the rent contained in his tack. This communing produced a charge for the feu-duties contained in *Shawfield's* charter; which being brought into Court by suspension, it was argued for the charger, that tacit relocation is a privilege only to tenants in the natural possession; and not to tacksmen of mails and duties, nor of feu-duties, who have no natural possession. If a tenant continue in the natural possession after his tack is expired, he cannot pretend to possess without paying rent to the proprietor; and the best rule for determining what rent he should pay, is what he paid formerly. But, if a tacksmen of mails and duties, or of feu-duties, continue to intronit after his powers are at an end, what should be the consequence, other than to account to the proprietor for every shilling he receives? Accordingly, tacit relocation is not to be considered as a privilege bestowed upon tenants, but what must follow from the nature of the thing, when one continues in the natural possession of another man's land.

To this reasoning it was answered for *Shawfield*, That the same expediency which in all countries has introduced tacit relocation with regard to tacks, has also introduced tacit relocation, or somewhat similar to it, in all other contracts of the same nature. In all affairs where the same operation is to be renewed annually, and where one undertakes to work for another, especially where the nature of the work requires a *delectus personarum*, the contract must bear one of two constructions; either that it is to end at the term covenanted as if it never had been, or that matters are to continue upon the footing of the contract, unless parties declare their will to the contrary. The former construction would be attended with inconveniencies; for however well the parties may be satisfied with each other, yet they must separate, unless the covenant be renewed *debito tempore*, which is always troublesome; often impracticable, as where a man happens to be abroad, where he becomes lunatic, or where infants without tutors succeed to an estate. Such inconveniencies have determined mankind to the other construction, that in tacks and other similar covenants a term of indurance is specified, that the parties may be at liberty after it is elapsed; and if they seek not to be free, that matters are to continue in *statu quo*. This construction more simple in the execution than the other, and attended with no inconveniencies, is, at the same time, so much more agreeable to the nature

nature and purpose of such bargains, that we can be at no loss to account why it has become universal. Tacit relocation therefore is founded on the consent of parties, justly implied from the nature of the bargain. And this is *Craig's* account of the matter, *lib. 2. dieg. 9. § 10.* and of Lord *Stair*, Book 4. tit. 26. § 14.

With regard to the pursuer's reasoning, it was observed, that had tacit relocation no other foundation but mere possession subjecting the possessor to a rent, it would not have the effect that the law gives it, nor indeed any good effect. For, if nothing were to bind the tenant but his actual possession, he would be at liberty to remove at any time he pleased betwixt terms, and be liable only to pay rent in proportion to the time he possessed. But he is bound for a year's rent, if he but enter upon a new year, or even if he do not intimate to his landlord *debito tempore* his intention to remove. And if consent be once established as the foundation of tacit relocation, there is *quam proxime* the same reason for implying consent in tacks of mails and duties, in tacks of teinds, and in tacks of feu-duties, as in common tacks, and the same utility and conveniency of execution in all of them. And to show that this is agreeable to the common sense of mankind, it shall be supposed that a tacksmen of mails and duties, after expiring of the term contained in his tack, continues in the civil possession, but loses the bulk of the rents by bankrupt-tenants; *Queritur*, Is he liable for the duty contained in his tack, or is he only liable for what he has received? If there be no tacit relocation, he is only liable for the latter. The pursuer must maintain this proposition, and yet no sensible man will be of his opinion.

“ The Lords sustained the defence of tacit relocation.”

Nº XVI.

November 1740.

SAMUEL GROVE *contra* JOHN GORDON, Esq:

FOREIGN.

GROVE brought a process against *Gordon*, for payment of L. 160 Sterling, in a holograph promissory-note, granted by *Gordon* to Sir *Archibald Grant*, dated, *London*, 11th November 1730, to which the pursuer had right by indorsation. The defender did not pretend the debt was paid, nor extinguished by any transaction; nor did he state any particular fact to show that it was an unjust debt; but rested his defence upon the statute of limitations in *England*; insisting, that the claim was extinguished by prescription; that no action would be sustained in *England*; and that if the claim was voided in the *locus contractus*, it could not be revived by bringing the action in another country. This defence was endeavoured to be supported by analogy: *Imo*, Of a *Scotch* bond informal by the act

1681, and therefore null, which it was averred would not produce action in *France*, nor in any other country where the law of nations is understood. 2^{do}, Of an usurious bond in *Scotland*, stipulating more than the legal interest, which would not produce action in a foreign country, even where the legal interest is equal to that stipulated in the bond. And 3^{tio}, Of the *exceptio rei judicatæ*, which can never be stronger than an exception founded upon a statute, and yet is sustained in all countries.

In answering this defence, it was premised, that foreign statutes have no coercive authority *extra territorium*; and therefore, that they cannot be pleaded to any effect here, other than to furnish arguments from equity, or from any other solid foundation, such as ought to be regarded in the judgments given by all courts. Upon this principle it was maintained, that a *Scotch* bond, informal by the act 1681, ought, notwithstanding, to produce action in *England* or *France*, being good evidence of the debt *jure gentium*; admitting the defender to make any just defence against the claim, and to verify his defence. But it was yielded, that an usurious bond ought not to produce action *extra territorium*, more than *intra territorium*; because the transgressing the laws of a society, is a wrong which ought to be discouraged every where. Upon the same principle, it was also yielded, that if a claim be extinguished in *England* by the statute of limitations, or in *Scotland* by the triennial prescription, a good defence lies against the claim in every other country; upon this rational presumption, that the claim must have been satisfied, or somehow extinguished, since the claimant suffered the door to be shut against him in his own country by prescription; and that this defence ought to be sustained unless taken off by some stronger presumption.

These things premised, the pursuer, to make his answer the more distinct, suggested the following point, Whether the defence was to be considered as a statutory defence, or only a defence in equity? He observed, that it could not be a statutory defence, because the statute founded on was not a *Scotch* statute; and therefore, could have no authority *qua* such in *Scotland*. He admitted the defence to be relevant as a defence in equity, upon the presumption that the debt was extinguished; but then contended, that the defender could not avail himself of this presumption, considering his acknowledgment that he had not made satisfaction, and considering that he does not state any fact to show that the debt is unjust.

With regard to the argument drawn from the *exceptio rei judicatæ*, the pursuer observed, that a judgment has in all countries the effect of voiding a debt as much as voluntary payment; and therefore, that an exception effectual in all countries must arise equally from each; but that a statutory exception is in a very different case: it has no stronger effect in any country than compensation has with us, which is, that it does not extinguish the debt till it be pleaded by the party, and applied by the Judge. For this reason, if a defender omit a
statutory

statutory defence, and suffer judgment to pass against him, upon which the money is recovered, he will not have a *condictio indebiti*. The statutory defence is barred as competent and omitted.

In this case, the defender had resided in *Scotland* some part of the six years : but it was thought, that this circumstance could afford no separate answer to the pursuer upon the statute of the 4th of Queen *Anne* ; both because the defender was in *England* when the cause of action accrued ; and also, because the statute of limitations is only suspended while the debtor is *beyond seas*, which are the words of the statute.

“ The Lords, notwithstanding, sustained the defence, and allowed the defender to be *foilzied*.”

Upon the plan of the pursuer's pleading, which appears just and solid, the statute of limitations, when pleaded in *England*, has an effect different from what it has when pleaded in *Scotland*. In *England* it is calculated to bar action ; and therefore, in *England*, action could not have been sustained upon this promissory-note. But in *Scotland*, where the statute can only be considered as an argument, not as a law, action ought to have been sustained upon the promissory-note, being a good evidence of the debt *jure gentium*. The defence upon the presumed extinction ought to have been found relevant at the same time ; but that it was elided by the answer, to wit, that the defender did not so much as say, Satisfaction was made.

Nº XVII.

December 1740.

LAING *contra* NICOL.

A R R E S T M E N T.

A Decree of furthcoming in absence being suspended, the charger, to instruct the debt due by the arrestee to the common debtor, produced a bond, which the arrestee had granted to a third party, with a general disposition of moveables by the third party to the common debtor.

The objection to this progress was, that a general disposition of moveables without confirmation, is not a vesting right, more than a disposition of land without investment : that the subject still remained in *hereditate jacente* of the disponent, in so much that a creditor of his confirming, would exclude the general disponent ; and therefore, the arrestment laid in the hands of a person who owed nothing to the common debtor, but to his cedent, could not be effectual. 2do, Confirmation being *actus legitimus*, no person is intitled to confirm but he alone to whom the subject belongs. Creditors have no power to confirm their debtors : if this could be, there had been no occasion

occasion for the act 1621, inventing the charge against an heir at the instance of his proper creditors.

What most difficulted the Judges was, that the arrester could not confirm a disposition to which he had no right. Precedents of the Commissary Court were appointed to be searched. None were found; and there the matter was suffered to rest.

The first point also seems well founded. A general disposition establishes no right, till it be completed by confirmation: and a decree of furthcoming cannot oblige the arrestee to make payment to the arrester, when he is not bound to make payment to the common debtor. And, if it be demanded, by what sort of diligence then is a general assignation of moveables to be carried where there is no confirmation? the answer is, that it must be carried by a process of adjudication, which is the legal remedy where others fail. Nor is it a novelty, that moveable subjects should be affected by adjudication. Where the debtor in a moveable bond dies without any to represent him, there can be no arrestment, because there is no person against whom it can be executed: the only remedy is to adjudge the bond from the creditor, which will intitle the adjudger to prosecute diligence, as the original creditor himself might have done. In the same manner where a general assignee is not confirmed, his creditors cannot point the goods contained in the general assignation, because these goods are not his before confirmation: as little can there be a decree of furthcoming; and so the only remedy is a legal conveyance of the general assignation itself by adjudication.

N^o XVIII.

February 1741.

CHRISTIAN BEGG *contra* JAMES ARNOT.

DEATH-BED.

DEBATED, but not determined, Whether a donator of *ultimus hæres* has the same privilege with a natural heir, to reduce a deed done on death-bed?

N^o XIX.

June 1741

BARBARA NEWLANDS *contra* ALEXANDER NEWLANDS.

CONTUMACY.

A Complaint being made to the Court of Session, against *Alexander Newlands* skinner, charging him with subornation of witnesses, the complaint was not only ordained to be answered, but
warrant

warrant granted to apprehend *Alexander Newlands*, and to bring him before the Court in order to be examined. *Alexander Newlands*, dreading the storm, had retired out of the country before the complaint was presented, leaving a factory with *Robert Bull* to answer for him. *Robert Bull* gave in answers to the complaint, which had not the effect to clear him. The Court pronounced the following interlocutor: “ Having again heard the foresaid petition and complaint
 “ of *Barbara Newlands*, and answers for *Alexander Newlands* with the
 “ interlocutors directed to macers or messengers, to apprehend the
 “ said *Alexander Newlands*, and to bring him to the Court in order to
 “ his being examined, together with the execution returned by
 “ *Francis Gibson* macer, that he had searched for the said *Alexander*
 “ *Newlands* and could not apprehend him; they grant warrant for
 “ letters of horning directed to messengers, to command and charge
 “ the said *Alexander Newlands* personally, or at his dwelling-place, if
 “ within *Scotland*, for the time; and if furth thereof, at the market-
 “ cross of *Edinburgh*, pier and shore of *Leith*, to compear before the
 “ Lords the third day of *June* next, in the hour of cause, with con-
 “ tinuation of days, to answer to the matters contained in the said
 “ complaint, under the pain of rebellion, and putting him to the
 “ horn; wherein if he fail, the said day being bygone, that the
 “ said messenger denounce him his Majesty’s rebel, and put him to
 “ the horn, and escheat and inbring all his moveable goods and gear
 “ to his Majesty’s use, for his contempt and disobedience.” And, it
 being reported to the Court, that the charge was given, as directed
 by the interlocutor, they proceeded to pronounce this other interlocutor: “ The Lords having taken under consideration the cause, *Bar-*
 “ *bara Newlands* against *Alexander Newlands*, and his having been
 “ charged, by virtue of letters of horning, to compear before the
 “ Lords the third day of *June*; and, having ordered their macer to
 “ call the said *Alexander Newlands*, both yesterday and this day
 “ thrice, and, he not compearing, they ordain him to be denounced
 “ rebel, and put to the horn, and all his moveable goods and gear to
 “ be escheat and inbrought to his Majesty’s use, for his contempt and
 “ disobedience, and ordain the horning and executions thereof to be
 “ thereafter registered.”

As this form of procedure was not common, the Judges, before they took any step, remitted to two of their brethren to search for precedents. Several precedents were found, and laid before the Court; some of which follow.

11th *June* 1577. The Lords of Council *ex officio* ordained letters to be directed, at the instance of our Sovereign Lord’s Advocate, to warn *Malcolm Bower* and *Henry Adamson* to compear personally before the said Lords 21st instant, with continuation of days, to answer to such things as shall be inquired at them, under the pain of rebellion, and putting them to the horn.

21st *October* 1578. The Lords of Council assigned to *Andrew Ker* notar, the 12th of *November* next, for exhibiting before the said

Lords his procothol, under the pain of rebellion and putting him to the horn, with certification, if he failzie, that letters will be directed accordingly.

22d *June* 1584. The Lords of Council ordain letters to be directed at the instance of *Thomas Martine*, to command and charge *John Heriot* of *Fingask* to compear personally before the said Lords the first of *July* next, with continuation of days, to answer *super inquirendis*, under the pain of rebellion.

18th *July* 1584. The Lords of Council ordain letters to be directed to command and charge Mr *William Brand* minister of *Falkland*, and *David* and *James Ramsays*, to compear personally before the said Lords 21st *July* instant, with continuation of days, to answer to such things as shall be inquired at them, under the pain of rebellion, and putting them to the horn; with certification, if they failzie, that letters shall be directed accordingly.

13th *July* 1586. The Lords understanding that Mr *William Lumfden*, parson of *Cleugh*, being apprehended by virtue of the King's letters past by deliverance of the Lords, in order to be brought before the Court, to answer certain points of falsehood, had made his escape, they grant full power and commission to *Patrick*, Master of *Gray*, Commendator of the abbacy of *Dunfermline*, to pass, with convocation of the lieges, and, in his Majesty's name, to search for the said Mr *William Lumfden*, and to make the King's keys, &c. and, being apprehended, to produce him before the Lords of Council and Session, to answer to the said points of falsehood.

1st *November* 1586. Our Sovereign Lord, and Lords of his Highness's Session and College of Justice, understanding that *Andrew Semple*, bailie-depute of *Paisley*, has, in a fenced court, holden within the tolbooth thereof, in presence of 200 persons, or thereby, by words indecent, heavily murmured, injured, blasphemed, disowned and lightlied the judgment and proceedings of the Court of Session, and there-through has incurred the pains contained in the acts of parliament; therefore ordain letters to be directed to officers of arms, Sheriffs in that part, charging them to command and charge the said *Andrew Semple* to enter his person in ward, in the castle of *Blackness*, within 48 hours after the charge, there to remain, upon his own expences, under the pain of rebellion, and putting him to the horn, and, if he failzie, to denounce him rebel, put him to the horn, and escheat and inbring all his moveable goods to his Majesty's use.

1st *December* 1592. A charter-chest, which, by order of the Lords in a process, was exhibited in Court, and in custody of the clerks, was violently spuilzied and taken away, under the colour of a warrant obtained from Sir *Richard Cockburn*, Secretary of State; and a complaint being brought into Court upon this atrocious delict, the Lords, disregarding the Secretary's warrant, gave command to their macers to charge the said Sir *Richard* to enter his person in ward, within the castle of *Edinburgh*, within three hours after his charge, and to charge the principal parties to enter their persons within the tolbooth of
Edinburgh,

Edinburgh, within six hours after their charge; there to remain, under the pain of rebellion and putting them to the horn; and, upon their failzie, to denounce them rebels, put them to the horn, escheat, and inbring, &c.

After all, a petition was presented to the Court, in the name of *Alexander Newlands*, complaining of the foregoing proceedings as arbitrary and unprecedented; that, in matter of contempt, the Court had no power other than to hold the absent party as confessed; that the foregoing precedents belong all to a period when liberty and property were not well ascertained; and that such dangerous powers had been entirely given up in later times; evident from this, that not a single instance has happened since the 1592.

It occurred to the Court, at advising this petition, that, by our old law, even in processes purely civil, the defender was bound to attend personally in Court; and his moveables were attached till he should find caution to appear; that this practice gave way to a more equitable form, borrowed from the *Roman* law, of holding defenders as confessed; but that, even in cases purely civil, the old form must still subsist, where the defender cannot be personally apprehended, to be held as confessed: much less doubt can there be that the old form must remain, with regard to matters of a criminal nature, where holding as confessed will not answer the purpose. It further occurred, that it is a privilege inherent in all courts, sovereign courts especially, to explicate their own jurisdiction, and to take all proper steps preparatory to judgment, such as obliging a man to answer personally to facts that are charged against him. And, if it be a necessary or useful step to examine a party accused, which is undeniable; it necessarily follows, that all legal compulsion may be directed by the Court to force personal comparance.

“ Upon these considerations the Lords refused the petition without answers.”

N^o XX.

July 1741.

Principal CLERKS OF SESSION *contra* EXTRACTERS.

PUBLIC OFFICER.

THE clerks of session, in *February* 1739, having made a table of regulations to be observed by the extracters, and the extracters having refused to comply with these regulations, six of them were dismissed by the clerks, because of their obstinacy. This produced a remonstrance from the extracters to the Court, complaining of the regulations as hard upon them, and insisting that they were possessed of a standing office in the Court, that it was their free-hold, of which they could not be divested except upon malversation, tried in a court of law. The Court first found, “ That the clerks of session cannot arbitrarily remove their servants, the extracters, without cause.”

But

But the clerks, in a reclaiming petition, having set forth, that the extracting of acts and decreets is a part of their office; that it is their subscription which gives faith and authority to an extract, and that the extractor is really and truly no other but their amanuensis; that the extracters are not even members of the College of Justice; and that, as the clerks are liable for all the writings produced in Court, of which the extracters must have the custody, when employed in extracting acts and decreets, it would be extremely hard upon the clerks, if they could not turn out their servants upon suspicion, when, in most cases, it is impracticable to bring a regular proof of malversing.

“ The Court altered, and found the extracters to be servants removable at pleasure.”

N^o XXI.

July 1741.

SIR ROBERT PRINGLE, and other Justices of the Peace, *contra* The Earl of HOME, and other Justices.

JURISDICTION.

BY the 38th act 1661, The justices of the peace, among other instructions to them, are required “ to meet and convene together “ four times in the year, *viz.* the first *Tuesday* of *May*, the first *Tuesday* of *August*, the last *Tuesday* of *October*, and the first *Tuesday* of *March*.” And, it is declared, “ That they shall have power to continue the said sessions, or to adjourn the same to such days and “ place as shall be most convenient.” Some of the justices of the peace of *Berwickshire*, judging *Greenlaw* the head burgh of the shire, to be an inconvenient place for their meetings, did, at an adjournment of the quarter-sessions, make a regulation in the form of a resolve, as follows: “ They resolve, that, for hereafter, they will hold their “ quarterly sessions, and other intermediate meetings in *Dunse*, excepting when occasionally their affairs render it proper for them “ to meet at some other place; and appoint the constables to notify “ this resolution to all the people of the country, by publishing the “ same at every kirk-door of the county, on the second *Sunday* of “ *June* after the forenoon’s sermon.”

The other justices apprehending that this regulation was beyond the power of the justices, brought it under review by suspension; in which they urged, that the head-burgh of the shire is, by common law, the place where all courts are to be held, unless the contrary be specified; and that this is supposed in the statute 1661, naming the days of meeting, but saying nothing of the place, leaving that to the regulation of the common law.

“ The Lords suspended the regulation *simpliciter*.”

N^o XXII.

N^o XXII.

28th November 1741.

SOMMERVILL *contra* GEDDIE.

D E A T H - B E D.

IN a reduction upon the head of death-bed, the proof came out thus : *1mo*, The granter, for a dozen of years before her death, was troubled, at intervals, with gravelish pains ; and she died of a fit of the gravel upon two days illness. *2do*, She was not troubled with the gravelish pains when she signed the disposition challenged, which was at nine at night, though she was in bed at the time ; and some of the witnesses add, that she did not appear to be in perfect health. *3tio*, She lived 45 days thereafter ; and, until within two days of her death, was in the ordinary state of health she had been in for a dozen of years before, managing her affairs within doors, unless when she was troubled with the gravelish pains. *4to*, She was of entire judgment when she signed the deed.

“ The Lords by a narrow plurality found it proved, That *Marion Miller* was on death-bed when she granted the disposition in question.”

N^o XXIII.

9th December 1741.

JAMES LEITH Esq; *contra* Lord BANFF.

P A S S I V E T I T L E.

JOHN Lord Banff, after possessing his estate for three years, during which time he contracted great debts, having died in the state of ~~app~~arency, one of his creditors brought an action upon the passive titles, against the present Lord Banff, brother to the deceased, concluding, that he should be found liable upon the act 1695, as being now in possession of the estate. He urged, *1mo*, That, though he could not subsume upon the express words of the first branch of the statute, since the defender was not served heir to the remoter predecessor, passing by the interjected apparent heir ; the equitable construction of the statute was for him, the fraud being as great, to possess the estate without acknowledging the interjected apparent heir's debts, as to serve to the remoter predecessor without acknowledging them. *2do*, That he was in the case provided for by the second branch of the statute, and could subsume in terms thereof, that the defender's possession of the estate subjected him universally to the predecessor's debts ; because, in the sense of this act, the interjected apparent heir is a predecessor whose creditors are provided for.

To the first it was answered, That the statute 1695, being a correctory law, it would be assuming no less than a legislative authority,

ty, to extend the remedy beyond the letter of the statute. To the second, answered, The interjected apparent heir is not a predecessor in the sense of the statute: nor is it any part of the intendment of the second branch, to afford his creditors relief. The first branch of the statute is calculated for their relief; and so far are they secured by it, that the next heir-apparent is barred from making up a feudal right to the estate, without doing justice to these creditors *in valorem*. The purpose of the second branch is, to provide an additional check against the fraud of heirs-apparent, who, by possessing upon singular titles, found means to elude all the checks formerly contrived: and the additional check is, to make the possession of an heir-apparent, whatever his title be, an universal passive title, equally as if he were entered heir, so as to subject him to all the debts of his predecessors; that is, to the debts of those who died infeft in the estate. To interpret this clause so as to benefit the creditors of the interjected heir-apparent, is to make the statute inconsistent with itself; for, upon that footing, the heir in possession would be liable to the debts of the interjected heir-apparent, not only universally, but even though the interjected heir-apparent should die without possessing a month; contrary in both articles to the first branch of the statute.

“ The Lords assilzied the defender.”

N^o XXIV.

11th January 1742.

CUMMING *contra* WALKER.

C O M M U N I T Y.

JAMES CUMMING, being chosen deacon of the butchers of *Edinburgh*, was charged with horning for payment of the sum in a bond, which had been granted some time before by the office-bearers of the corporation to *James Walker*, in the following terms: “ We
“ the said *Archibald Brown*, &c. bind and oblige us, and our successors in office, conjunctly and severally, thankfully to content and
“ repay to the said *James Walker*.” In a suspension of this charge, the case was considered with regard to two different sorts of corporations; one, where there is a power to borrow money, the other, where there is none: and, with regard to both, the reasoning was as follows: When a set of men are incorporated in order of traffic, with express powers to borrow and lend, there is no doubt that the present office-bearers, as representing the incorporation, may be sued for payment of money borrowed by their predecessors in office. The reason is obvious; that there is no form for bringing a corporation into a process, but by citing the office-bearers. And, for the same reason, when a bond is granted binding the office-bearers, and their successors in office, the successors may be summarily charged upon the bond; a charge being the only compulsion provided by law to oblige the corporation to do justice to the creditor. But, even in that case, the

the proper effects of the office-bearer will not be affectable by such a diligence: all that can be done is, to throw him into jail, as representing the incorporation. The effects of the incorporation may be attached for payment of the debt, but not the proper effects of any one member. A royal burgh is a proper example, being an incorporation holding land of the King, and having consequently a power to contract debt. The present magistrates of *Edinburgh* are liable to a summary charge for payment of debt borrowed by their predecessors in office; the creditor may proceed to incarcerate the magistrates, as representing the town, if they postpone payment; but no creditor ever dreamed, that the provost of *Edinburgh's* proper estate can be adjudged for payment of any of the town's debts.

Such is the case of incorporations who have power to contract debt. But there are many incorporations who have no such power, which is the present case. The butchers of *Edinburgh* have a seal of cause, and are united *ad hunc effectum* only, to bar any person from exercising that trade without paying them a composition: they have no land: they may have a box, but no other common property; and they have no power to contract debt *qua* incorporation. If a man lend his money to such a society, he can have by law no action, except against the persons who receive the money; unless he can shew, that it was *in rem versum* of the society: in which case he can claim his money out of the box. But it is absurd to think, that the office-bearers of such an incorporation can bind their successors in office, when they have no power to borrow money in name of the corporation. A man who accepts to be deacon of such an incorporation, has not reason to apprehend danger from public debt: he can never dream that an incorporation which has no power to borrow money, can be in debt.

The company of archers were incorporated by *James VI.* but with no power to borrow money. Suppose any one had been so foolish to lend money to the company twenty or thirty years ago, would he not be laughed at to make a demand upon the present office-bearers of the company?

“ The Lords passed the bill without caution, upon consigning a
“ disposition to the effects of the incorporation.”

N^o XXV.

January 1742

Captain CHARLES CAMPBELL *contra* Representatives of his Brother
ARCHIBALD.

PROVISION to HEIRS and CHILDREN.

COLONEL *James Campbell*, in his contract of marriage, became bound to secure a special sum out of the conquest during the marriage,

marriage, "to himself and spouse in conjunct fee and liferent, and to the bairns to be procreate of the marriage in fee; which failing, to his heirs and assignees." The Colonel died without performing his obligation, leaving three sons, *Archibald*, *Charles*, and *John*, and a daughter *Mary*. *John*, having died without claiming his share of the said provision, it was disputed among the surviving children, By what rule the subjects contained in the said provision should be divided amongst them? For *Charles* it was pleaded, that an heir of provision in a contract of marriage, is *eo ipso* creditor, requiring no service to vest the right in him; that the *jus crediti* established in *John* by the said provision, must, after his death, transmit to his heir *Charles*, who consequently is intitled to draw *John's* share, over and above what belongs to himself *jure proprio*. *Archibald* being dead, it was pleaded for his representatives, that a provision in a contract of marriage does not vest in the heir or heirs without a service; and therefore that *John*, who died without a service, can transmit nothing to his representatives; which must produce a tripartite division. And, to support this side of the debate, the following chain of reasoning was employed.

It was premised, that an obligation to pay certain sums to children of a marriage, at a certain age, or at marriage, must be distinguished from an obligation to settle a subject, whether land or money, upon the husband and wife in conjunct fee and liferent, and upon their children in fee. In the former case, the children are creditors and fiars of the stipulated sums; and therefore a service is no more necessary; than where a bond of borrowed money is granted to them.

The other case, which is that under consideration, is more intricate. And to clear it, the condition of the children shall first be considered, and next, that of the father. The children acquire several powers or faculties by such a settlement. *1mo*, They have a faculty to compel their father, or whoever is the obligant, to secure the sum in terms of the contract; and this faculty they have even during the father's life. *2do*, After the money is secured, whether upon land, or by the bond of a responsal debtor, the children are intitled to challenge every alteration or alienation made by the father, contrary to the *bona fides* of the contract. *3tio*, Supposing no contravention, the children, as heirs of provision, are intitled to succeed, and to enjoy the subject.

The two first faculties mentioned, are no more than what belong to every heir of entail, immediate or remote, in order to preserve the subject entailed for their use. And it is with regard to these faculties, that heirs of a marriage, or of provision, are understood to be creditors; *Stair*, tit. Heirs, § 19. These faculties they can exercise without a service; for the action is competent to the immediate substitute, during his father's life, when he cannot be served; and is also competent to a remoter substitute, who possibly may never succeed. But then, it must be observed, that privileges of
this

this sort, which do not suppose the fee or property to be in the pursuer, are no other than personal faculties or powers, which not being derived from any predecessor, require not a service: each substitute in the settlement has, by the entail, a title to oblige the obligant to fulfil, and also can challenge any deed done against the settlement; and he must consequently have an action to make good his claim. If this needs any explanation, it will be evident by a familiar example. An heir apparent is intitled to reduce deeds done by his predecessor upon death-bed. This is no *jus crediti* nor fee, in the heir-apparent, derived from an ancestor: it is a personal privilege, which belongs to him in his own right; and, if he die without exercising this privilege, it dies with him. The like action is indeed competent at the instance of the next heir-apparent; but it is competent to him in his own right, not as deriving right from the deceased heir-apparent; the rule in law being, That a proprietor, upon death-bed, cannot hurt any of the substitutes in his estate, whether immediate or remote.

As to the last mentioned power or faculty competent to the children, which is, to succeed to their father as heirs of provision, it must be evident, supposing the sum secured to be existing, that they cannot make that power or faculty effectual, otherwise than by a service. The only question is, supposing no performance of the obligation during the obligant's life, whether they can insist against his heirs of line, to pay the sums to them directly as creditors, without the intervention of a service? To handle this point with precision, two different cases must be stated. It happens commonly in contracts of marriage, that the husband's father, if he be alive and hold the estate, becomes bound to provide a certain subject, money or land, to his son the husband, and the son's wife, in conjunct fee and liferent, and to the heirs or children of the marriage in fee. In this case, the husband is the institute or creditor in the obligation; and therefore, whatever action the children of the marriage may have to force performance in their own right, they never can enjoy, nor hold the subject, but in the right of their father the institute or creditor. He was intitled to enjoy the subject in the first place, and they only as deriving right from him. Supposing next the husband himself to be obligant, he, in that case, supports two different characters: he is debtor or obligant; he is, at the same time, creditor or institute in the entail; and therefore, though the children, in their own right, may have an action against him *qua* debtor, to perform his engagement; yet, as they are but substitutes, they cannot hold or enjoy the subject, but as deriving right from their father, *qua* institute; and consequently a service is necessary.

And thus the question is in effect answered. If the subject be secured, in terms of the contract, it is agreed, that a service is necessary: the same must obtain, though the subject be not secured. The children, in this case, have two separate faculties to be separately exercised: they have an action to force performance, which they have

in their own right without a service; but then, as the father's representatives are not bound to make payment directly to them *qua* creditors, but as substitutes to their father, they must be served as heirs of provision, in order to have the subject established in them, as much as they would be bound to do if the subject had been secured during the father's life.

The fallacy of the argument urged against the necessity of a service, will now plainly appear. "It is admitted, that a service is necessary when the sum or subject is actually secured in terms of the contract of marriage; but that, while the obligation stands unperformed, the bairns are creditors; that, when the action is pursued against the father, it can have no other effect than to oblige him to perform, that is, to secure the subject, in terms of the contract, to himself in fee, and to the children; but that, when the action is laid against his representatives, it resolves into an action for payment; because the father's fee dies with him, whereby the bairns of the marriage fall into the full right. This is the very reasoning upon which the Lords, 3d February 1732, *Campbell contra Duncan*, in a case similar to the present, sustained process for payment, at the instance of an assignee of an only child of the marriage, after the child's death, and found no necessity for a service." This reasoning is obviously inconclusive. It is true, that the father's fee dies with him, and the bairns of the marriage fall into the full right. But, how do they fall into the full right? Here lies the fallacy. They do not fall into the full right as fiars or proprietors: they fall into it as any other heir does after his predecessor's death; that is, they have access to make up their right to the subject by a service, and thereby to establish a fee or property in themselves.

The death of *Charles Campbell* prevented the determination of this point; and the controverted matters were afterwards finished by a transaction. However the Court will probably hereafter find a service necessary, as they have hitherto done, except in the single case of *Campbell contra Duncan*.

N° XXVI.

9th February 1742.

Creditors of MITCHEL *contra* WARDEN.

L I F E R E N T.

JOHN MITCHELL merchant, who stood bound by his contract of marriage to secure his wife *Janet Warden* in a liferent of 500 merks yearly, made a purchase of an old tenement, and of a waste area adjoining to it, taking the disposition "to himself and wife, and longest liver of them, in liferent and conjunct fee." And, upon this disposition, infeftment was taken in name of both. *Mitchell's*

cbell's scheme in making the purchase, was to have a sufficient area upon which to build a large new tenement. He accordingly razed the old tenement to the very foundation; and erected a large new tenement, for which he got a rent of L. 60 *Sterling*, thrice the rent of the old tenement. *Mitchell* became bankrupt, and, after his death, there ensued a competition about the rents of this new tenement, betwixt *Janet Warden* the relict and the adjudging creditors. She claimed the rents of the new tenement, to the extent of the liferent-provision contained in her contract of marriage; upon this footing, that the liferent settled upon her of the old tenement and waste area, must be understood to be performance *pro tanto* of her husband's obligation to secure her in a liferent of 500 merks yearly.

The creditors, on the other hand, contended, that the old tenement being *funditus* demolished, her liferent of the same was at an end; and that nothing remained to her, but a personal claim against her husband for recompense, or for damages. And for this the *Roman* law was appealed to, *Eo amplius constat, si ædes incendio consumptæ fuerint, vel etiam terræ motu, vel vitio corruerint, extinguï usum fructum, et ne aræ quidem usum fructum deberi.*

It was answered for the relict, that her case comes not under the rule laid down in the *Roman* law; and that there is a material difference betwixt the *interitus rei casu fortuito*, and demolishing the tenement *dedita opera*, in order to rebuild. It was observed, that if a liferenter himself demolish the house and rebuild the same, his liferent subsists in the new house as it did in the old; which is in effect the present case. *Mitchell* could not demolish the old tenement without his wife's consent; and her consent must have the same operation as if she herself had erected the tenement. In effect, they clubbed together to the work, and they were to be sharers in the benefit, in proportion to their respective interests. It is true, it was the husband who laid out the money, which procured the wife a more extensive liferent than she had before: but then he stood bound by his contract of marriage, to give her a more extensive liferent, to wit, 500 merks yearly, to which she restricts her claim of liferent upon the new tenement. She does not pretend to compete with the creditors as to the surplus; seeing this surplus may fall under the description of a *donatio inter virum et uxorem*.

“ The relict was found intitled to the rent of the tenement, to the
 “ extent of the sum for which she was creditor by her contract
 “ of marriage.”

Nº XXVII.

13th February 1742.

COMPETITION CREDITORS OF CREICHEN.

CREDITORS OF A DEFUNCT.

THE Act of Sederunt 1662, ordaining, “ That creditors using
 “ legal diligence within six months of their debtor's death, by
 “ citing

“ citing executors-creditors, intromitters with the defunct's goods, “ *Ec.* shall come in *pari passu* with the other creditors, who have “ used more timely diligence, by obtaining themselves decerned and “ confirmed executors-creditors, or otherwise,” was not intended to prefer the creditors who had inchoate diligence within the six months, before those who commenced their diligence after it was elapsed; but barely to disappoint those creditors who, taking the start, have completed their diligence within the six months; which is done by bringing in *pari passu* with them, all other creditors who have done any sort of diligence within the six months. But the competition among creditors, some of whom have done diligence during the six months, others after, is left to the determination of the common law.

N^o XXVIII.

2d June 1742.

MRS JEAN KER *contra* WILLIAM ROBERTSON.

LEGITIM.

MAJOR *Robertson*, whose estate was all in moveables, made a testamentary settlement, in which he nominated to be his executor and universal legatee, *William Robertson* his only child, and the heirs of his body; whom failing, *Jean Ker* his spouse. After the Major's death, tutorial inventories were made up of his estate, which was managed, during the son's life, without any confirmation. And the son having died, about the age of fifteen, unmarried, the relict took up the succession by virtue of the substitution contained in the testament.

William Robertson, brother to the Major, insisted in a process against the relict, claiming the legitim belonging to his nephew the minor out of the Major's effects, to which he the pursuer had now right as next of kin to his nephew. The defence was, That the testament in favour of the son, whereby he got the universal succession, was full satisfaction of the claim of legitim.

Answered, The substitution in favour of the relict in case of the son's death without issue, imports a prohibition upon him to alter the settlement, at least during his minority: therefore this testament was not full satisfaction of the legitim, since, instead of an absolute, it bestowed only upon the son a limited right. And as there is no evidence the son ever acknowledged this testament by acceptance or otherwise, his claim of legitim did subsist, and must transmit to his next of kin, precisely as if the Major had died *intestate*.

Replied, The Major's settlement is a simple destination: it contains no clause prohibiting an alteration of succession; nor can any such clause be implied: and, though it were implied, and even expressed, the settlement would notwithstanding be effectual, as there is no law to bar a substitution with regard to the legitim.

“ Found,

“ Found, That, notwithstanding the testament, the pursuer, as
 “ heir *in mobilibus* to his nephew the testator's son, has right to
 “ the legitim that belonged to his nephew.”

The point strongly laboured for the pursuer was, That the legitim is a right in the moveables which the children have in common with their father and mother, of which common property the father is administrator during his life; but that, after his death, the same divides in three equal parts, one part to the wife, another to the children, and the third, called dead's part; which last is the only part the father has power to test upon. The judges were generally of opinion, that the legitim is but a right of succession; evident from this, that the children, who do not survive their father, have no claim. It was also thought by most of the Judges, that it would be going too far to say, that the father, in no case, could make a substitution with regard to the legitim; for, what if a child should die in infancy, before being capable of making a testament? But then it was the opinion of the plurality, that, in the present case, the testament implied a prohibition to alter in prejudice of the substitute, which was *ultra vires*; and therefore, that the substitution was void.

Several things not stated, or not sufficiently cleared, may justly occasion a doubt about this judgment. *1mo*, There is no limitation expressed in the testament; and if the Major had no power to limit his son's fee, why will we presume that he intended so idle a thing as to transgress his powers; especially when he must have known, as the law is supposed to be universally known, that such prohibition must defeat his settlement with respect to his wife?

In the next place, let us suppose an express prohibition to alter the substitution; it seems not to follow that this must defeat the substitution. There is no foundation in law nor in reason for holding, that in every case a deed partly *ultra vires*, is void *in totum*. It is true, that where the several parts of a deed are mutual clauses one of the other, or have any other such intimate connection, the whole must stand or fall together: but, in the present case, the prohibition is separable from the substitution, and the latter may subsist after the former is taken away. Now, it is the genius of law to support deeds, as far as they can be supported, *ut actus valeat*; and yet the present judgment voids that part of the will which is lawful and just, as a punishment upon the testator for endeavouring to fetter his son the legatee, which he had no power to do.

3tio, This supposed prohibition is, at worst, a very harmless matter: it is agreed to be void in law, so as perhaps not even to need the form of a reduction. Had the minor made a testament in favour of the pursuer, or in favour of his mother, the will in either case would have been effectual. Here then is a singular operation of law; a clause in a deed having no effect to answer the purpose intended, and yet having an effect quite opposite to what was intended.

M

And

And *lastly*, it is no improbable supposition, that it was the minor's inclination to prefer his mother to his uncle. Upon that supposition, the son's will is defeated by this judgment, as well as that of the father.

N^o XXIX.

12th July 1742.

CUMMING *contra* ABERCROMBY.

EXPENSES.

A Tentative process of reduction and improbation being brought against a gentleman in possession of an estate, who, in the course of the process, produced a clear progress from the 1663 downward, which, by the positive prescription, secured him against all challenge: the Court was of opinion, That such tentative processes, which gave much vexation, ought not to be rashly commenced; and therefore, abstracting from all particular circumstances, they found expences due to the defender.

N^o XXX.

23d July 1742.

MARY PROVAN *contra* CALDER of Reidfoord.

PACTUM ILLICITUM.

CALDER and his companion *Anderson*, being one evening in an ale-house at *Falkirk*, and *Calder* in his cups offering to kiss the servant-maid, was desired to retire with her into another room; from whence, after a short interval, she returned to the company with a bill of L. 100 *Sterling*; saying, she had got it from *Calder* upon a promise of marriage, and gave the bill to *Anderson* to be kept for her. This was made the foundation of a process of exhibition and payment, at the servant-maid's instance against these gentlemen, in which a proof being admitted before answer, the foregoing fact came out. The defender, *Calder*, denied that any thing criminal had passed betwixt him and the pursuer; nor was such a thing alledged on the part of the pursuer. But some of the Judges being impressed with the notion that this bill was *præmium pudicitiae*, and was the means made use of by *Calder* to debauch an innocent young woman, the defender's lawyers were obliged to state some of their defences so as to meet this suspicion. Admitting that it is highly criminal to attempt the chastity of a virtuous woman, they observed that it may be attended with very bad consequences to countenance a process of this nature, without distinction of persons; as it would infallibly furnish bad women, or those of a suspected character, with an opportunity to
pick

pick the pockets of young men, who in drunkenness, or otherwise in hot blood, would be an easy prey to them. *2dly*, That though an obligation granted as a reward after the fact is committed, may be effectual in law, such as a bond granted *causa adulterii*, yet that the law does not countenance an obligation granted upon the condition of doing an unlawful act; action cannot be sustained upon such an obligation, which would be giving countenance to wickedness, and encouraging the same by a solemn judgment. And therefore, as the bill in question is supposed to have been granted, in order to entice the woman to submit to the granter's unlawful desires, it is null, as granted upon the condition of doing an unlawful act.

The first argument could only be answered by a supposition, of which there was no evidence, that *Mary Provan*, though a common servant in an ale-house, was a most virtuous woman, and would not have been drawn to prostitute her body without a very strong temptation. The same supposition was insisted on in answering the second argument. And indeed, upon this supposition, there is some foundation for distinguishing the present case from those where the condition of the grant is, to commit an action wicked in itself, such as murder or perjury, which ought never to be countenanced by sustaining action for the premium. But, as the yielding to a man's desires is unlawful only as to the manner, and as the temptation may be great to excuse the frailty, there appears to be a tolerable good foundation for awarding damages to the person thus corrupted; and consequently, to sustain action upon a bill granted for such a cause.

" It was carried, by a narrow plurality, to repel the defences, and
 " to find the defenders conjunctly and severally liable for the
 " L. 100 Sterling."

Patrick Calder thought himself so much injured by this judgment, that he brought an appeal to the House of Lords: and the judgment was affirmed.

N° XXXI.

30th July 1742.

MINISTER of *Eskdalemuir contra* SCOTT.

T E I N D.

A Decree of locality subjects the heritor personally to the stipend localled upon his land. And upon that medium it was found, That the minister may charge any of the tenants for payment of the sum localled, and that the tenant is liable to the extent of his rent, stock and teind, so far as the rent is in his hands.

N° XXXII.

N^o XXXII.

12th November 1742.

CREDITORS of *Garroch contra* ELIZABETH CAIRNS.

REPRESENTATION.

SUBSTITUTE and conditional INSTITUTE.

JAMES CAIRNS of *Minibuie*, lent L. 600 *Scots* to *Alexander Cairns* of *Garroch*, and took a bond for the sum "payable to the said *James Cairns*, he being in life; and, failing of him by decease, to *William Cairns* his second lawful son, heirs or assignees, secluding "executors, betwixt and the term of *Lammass* 1694." *William Cairns* the *nominatim* substitute, having died before his father without issue, *Elizabeth Cairns* his niece, only child to the eldest brother *Alexander*, did, after the death of her father and grandfather, expedite a general service as heir of line to her grandfather, and also a confirmation as his next of kin; and, upon these titles, she led an adjudication upon the said bond against the debtor's estate. In the competition of his creditors, the following objection was moved against her interest; that the said bond containing an express substitution, did not fall to the heir of line; nor was a general service as heir of line the proper title, because it could only be carried by a service as heir of provision.

Answered for *Elizabeth Cairns*, That she is both heir of line and heir of provision; and since she has the natural right to the bond, it was a matter of indifference what title she chose. *2do*, The confirmation is the more proper title, which the following considerations make evident. The creditor did not intend to entail this trifle: he meant no more but to make a provision for his second son, in case of his surivance; which event failing, the destination vanished, as if it had never been: the bond fell under the creditor's executry, and *Elizabeth Cairns* has right to the same as being confirmed executrix to her grandfather. In short, *William* was a conditional institute, not a substitute.

To the *first*, the creditors replied, that *Elizabeth Cairns* is acknowledged to be the person who is intitled to succeed to this bond: yet as she has made her election to represent her grandfather as heir of line only, her service in that character will not carry any subject she is intitled to as heir of provision. This proposition was endeavoured to be made out by the following chain of reasoning: *Sui et necessarii heredes* not being known in the law of *Scotland*, it is optional to every heir to take up or abandon the succession; for this reason, if two different titles of representation coincide in the same person, he may chuse the one title and desert the other; consequently, if he make up his title in the one way only, this is, by construction of law, deserting the other; for what more proper indication

dication can he give of his will than by acting in this manner? And indeed, were there any latitude of construction indulged here, it might lead to fatal consequences; for, as the active and passive titles always go together, if one intending to take up a particular subject as heir of provision, shall, by construction of law, have right to whatever he could claim as heir of line, the consequence must be to subject him to all the predecessor's debts, though he never intended to be so liable.

The creditors, in their reply to the second, endeavoured to make out that this was a proper substitution; that the only title by which the bond could be carried, was as heir of provision to *James Cairns* the creditor, and that it did not fall under his executry. To this effect they stated the following propositions. *1mo*, When a bond is taken payable to a man at a certain term, he being in life, and, failing of him by decease, to another; it was formerly established, that a substitution was not intended, but a conditional institution; consequently that the second person could only have right in case the person first named died before the term of payment; and therefore, that if the person first named survived the term of payment, the bond descended to his own representatives, as if there had been no provision of succession in the bond. But this was altered by later practice; for, though the foregoing construction might be agreeable to the words of such a clause, yet it could scarce be thought agreeable to the creditor's intention: it was reasonably judged, that the person whom the creditor did prefer to succeed to him, in case he died before the term of payment, would be the same whom he would prefer in case he died after the term. Hence the strict way of interpreting such clauses, by conceiving them to be only conditional institutions, wore by degrees out of use, to give place for the more favourable construction of a proper substitution, taking place equally whether the creditor die before or after the term of payment: and now it is universally received as a rule, that, *in dubio*, a substitution is rather to be understood than a conditional institution. And, according to this rule, there is no doubt left, that if *William Cairns* the *nominatim* substitute had survived his father, he would have taken the bond, and not the father's representatives, though the father survived the term of payment.

Next, where a man takes a bond to himself, and failing of him by decease, to *Mævius* and his heirs, executors, and assignees; though *Mævius* die before the creditor, his representatives will be heirs of provision to the creditor, and will take the bond, excluding the creditor's heirs of line, and nearest of kin. This is no more but an extension of the former rule, and depends upon the same reason. What the creditor is supposed to have in view is, that after his own decease, *Mævius* shall succeed to the bond, and his heirs after him. If in this case, which is principally in view, *Mævius's* heirs be preferred before the creditor's own heirs, it can scarce be thought the creditor intended a different succession upon the unforeseen accident of

Mævius's dying before him: it would be whimsical to prefer his own heirs in that particular event, when *Mævius's* heirs are preferred in the event principally in view; and therefore, this construction is not to be admitted, unless the expression be such as to leave no room for doubt. From these premises it follows, that though *William* died before his father, the substitution is not vacated: his heirs are called to the succession in his place; and had he left a child, that child would have been intitled to the bond, by serving heir of provision to its grandfather. And *Elizabeth Cairns* can have no other title to this bond, but by qualifying herself heir to her uncle *William*, and in that character serving heir of provision to her grandfather.

“The Lords found, That the bond could only be carried by a service as heir of provision to *James Cairns* the creditor, and not by a service as heir of line; and therefore found *Elizabeth Cairns's* adjudication null, as proceeding upon a bond to which she had made up no proper title.”

N^o XXXIII.

19th November 1742.

NEILSON *contra* RAE.

A R R E S T M E N T.

A Set of *Glasgow* merchants having contributed a common stock to carry on a joint trade to the *West Indies*, by purchasing a ship, loading her outward, and, with the produce, to purchase a homeward cargo; one of the partners became bankrupt after the society had subsisted several years. Some of his creditors used arrestments in the hands of the company, and he dying soon thereafter, others confirmed his interest in the company. A competition ensued betwixt these different sets of creditors, where it was objected to the arresters, That arrestment is not a proper execution to carry a partner's stock in a trading company. This point was new, and produced a hearing in presence. The sum of what was pleaded for the executors creditors, was as follows. They admitted, in the first place, That in all trading-companies the common stock belongs to the company, in the same manner as in companies incorporated by charter; and that the company-debts must come off the whole head of the company's stock, before any partner can draw his share. They proceeded to ascertain, as follows, the nature of the share and interest that belongs to a member of a trading-company. A man who joins as a partner, pays in his proportion; the money is sunk into, and becomes part of the company's stock; what the man gets in lieu of his money, is a *right of partnership*; whereby, on the one hand, he is intitled to a proportion of the profits arising upon the joint-trade; on the other, is subjected to a proportion of the loss; and, in all events, to draw a proportion of the common stock,

stock, when the company is dissolved. They observed, that this right of partnership is, properly speaking, the only thing that can be called a partner's stock; though, in common language, the money contributed by a partner is called his stock; which is not without a meaning, because the extent of a right of partnership is in proportion to the money contributed, unless the contrary be specified. Hence the stock belonging to the company, is a very different thing from the stock of any particular partner: the company's stock is made up of bonds, bills, goods, houses, ships, lands, &c. which, considered as an *universitas*, belong to the company as if it were a politic body: the stock belonging to a partner, does not affect any subject or any person; it is neither a right of property nor of credit; it is a right different from both; by which the partner is intitled to a proportion of the profits arising from the joint stock.

From these premises it was inferred, that a partner's stock in a trading company, cannot be the subject of arrestment. *1mo*, No other subjects but debts or goods are described in an arrestment, and therefore no other subject can be affected by it. A right of fishing, a right of division, servitudes, and privileges of all kinds, are legal subjects, none of which can be affected by arrestment; because none of them can be brought under the denomination of debts or goods. A right of partnership is similar to these as to the point in dispute. *2do*, As the effect of an arrestment is to oblige the arrestee to detain the subject till it be called for by the arrester in a process of forthcoming, nothing can be the subject of an arrestment but what can fall under detention or custody; which cannot be said of a right of partnership more than of a right of servitude. A right of partnership is not a claim, nor *jus crediti*; the company is not liable in any sum, nor in any prestation; a partner's stock is not in their custody or keeping to be made forthcoming by them.

It was further urged, That, when the arrestments were laid in the hands of the company, the whole stock belonging to the company was either in the hands of their supercargoes at sea, or of their factors abroad; and therefore, supposing the arrestments otherways well founded, there was nothing in the company's hands to be made forthcoming.

The arrester's maintained, That a partner's stock is a proper *jus crediti*, which he purchases with his money that goes into the company's stock; similar to a bond of borrowed money purchased with a sum, the property of which is transferred to the debtor; differing only in the following particular, that, instead of a certain yearly profit, the profits are casual, depending upon the success of the company-trade; that the company is the debtor, for does not a proper action lie against the company, at the instance of every partner, to make his stock effectual, whether by accounting for the profits, or by delivering to him a proportion of the company's stock? Were not the company debtors to each particular partner,

ner no action could lie against the company *communi dividendo*, nor an action to account for profits, but only against the intromitters with the company's stock and profits.

Hence it was inferred, That a partner's stock, being properly a company-debt, is arrestable, and may be ordained to be detained by the company, till it be called for in an action of forthcoming. And, if so, it is of no importance whether or not the company's effects were in the hands of the supercargoes or factors, when the arrestments were executed. When a partner's stock is transferred to his creditor by a decret of forthcoming, the profits arising after the arrestment are transferred with the stock; precisely as annualrents are, that become due after arrestment of the bond.

The arresters insisted on a separate topic, That, by their debtor's bankruptcy, the society was dissolved as to him; after which there remained nothing with him but a claim against the company for a proportion of the common stock, *deductis debitis*; which, in all views, must be the subject of an arrestment.

The Court, laying bankruptcy out of the question, were of opinion, That a right of partnership in a trading-company is arrestable; and consequently, that the supervenient profits, from the date of the arrestment to the decret of forthcoming, will be carried. They considered, that a right of partnership, after a partner's death, may be confirmed, to the end of pursuing a division of the company's effects; and were of opinion, That an arrestment, with a decree of forthcoming, will carry every subject which can be confirmed. And to prove that a right of partnership is arrestable, even while the society subsists, an example was given of bank-stock, which *de praxi* is carried by arrestment and forthcoming. And so they adhered to the Ordinary's interlocutor, which was in the following terms: "Finds, that it was competent for the creditors of the bankrupt partner, to affect their debtor's interest in the copartnery by arrestment: and that the arrestments laid in the hands of the remaining partners did habilely affect the same, though the company's effects were, at the date of the arrestments, in the hands of the company's supercargoes at sea, or of their factors abroad; and finds the same liable to be made forthcoming to the creditors by the partners, as far as made good to the company by their supercargoes or factors."

But here it was not understood, that an arrestment can carry a right of partnership to any other effect than to pursue a division. The Court was not of opinion, that an arrester is intitled to be a partner in place of his debtor. Hence it may be inferred, That an arrestment of a partner's stock, will not carry the benefit of any new adventure, begun after the date of the arrestment.

N^o XXXIV.

2d December 1742.

MURDOCH KING, Supplicant.

PERSONAL DILIGENCE.

MURDOCH KING, upon a decree *cognitionis causa*, having obtained an adjudication before the sheriff of *Stirling*, containing a precept against the superior to infest him in the lands adjudged, did apply in common form to the Lord Ordinary on the bills, to direct letters of horning against the superior. The Lord Ordinary, after advising with the Court, having recommended to the keeper and writers to the signet, to search into the practice, their report was, "That they know of few instances of adjudications, before inferior courts, and that they never observed a horning pass thereupon where there was no abbreviate, though some of the society have seen such adjudications without abbreviates, but had no opportunity to know whether horning followed or not; that the society is of opinion they are sufficiently warranted to present bills and expedite letters of horning upon such adjudications, though there be no abbreviate, provided such decrees contain precepts directing horning against superiors."

What occurred to the Lords for refusing to direct letters of horning was, that a decree *cognitionis causa*, according to its present form, contains no decerniture against the superior, who is not so much as called for his interest; that therefore, though in obedience to the act 10. parl. 1606, horning must be granted upon every decree pronounced by a sheriff, it will not follow, that horning must be summarily issued against a person not called in the process; and that the proper course, in this case, is, to pursue the superior *via ordinaria*; and, when decree is obtained against him, horning will follow of course.

It was also urged, That, if the Court should think itself impowered to issue out summary diligence against the superior, instead of an ordinary process, it would not be for the public interest to exert a *nobile officium* in this case; that there is no law for recording adjudications *cognitionis causa* pronounced by the sheriff, which makes them an inconvenient diligence; and that, therefore, it would be reasonable to come to a resolution, and to publish an act upon it, always to refuse horning upon such an adjudication, unless it be recorded.

"The Lords accordingly refused the bill."

N^o XXXV.

3d December 1742.

CAVES *contra* SPENCE.

P R E S C R I P T I O N .

IN the 1710, *David Spence*, secretary to the bank of *Scotland*, applied to *James Clark*, engraver to the mint, for the loan of L. 50 *Sterling* to *Bannerman*, a friend of his. *Clark* agreed to advance the money upon *Spence's* promise to be his paymaster. The bond is in *Spence's* hand-writing; he is also a subscribing witness thereto; and it does not appear that *Clark* had any communing with *Bannerman* upon the subject. This bond is dated *November 1710*; and, in *October 1712*, *Clark* becoming uneasy about his money, *Spence* agreed to convert his promise into a written obligation; and accordingly, 23d *October 1712*, gave him a holograph note, in the following terms: "Whereas *James Clark*, engraver to the mint, did, at my desire, lend "to Mr *Bannerman* L. 50 *Sterling*, conform to his bond given there- "upon the 22d *November 1710*; therefore I hereby oblige me and "mine, that Mr *Bannerman* shall truly and faithfully pay the said "sum and annualrents, or that I shall content and pay the same my- "self at demand, upon the said *James Clark* his giving me an assigna- "tion to the said bond."

The bond and accessory holograph note came, by progress, to *Katharine, Mary, and Christian Caves*; and *Bannerman* being bankrupt, they insisted for their payment against *David Spence*, whose defence was, That, *ex facie* of his holograph note, he was a cautioner; and therefore was free by the septennial prescription.

Several answers were made to this defence. One only shall be mentioned, being that upon which the judgment proceeded. It was to this effect, that the statute 1695 is not calculated to give relief in every sort of cautionary-obligements, but only where the cautioner becomes bound in the original obligation, and at the time of lending the money; and the following reasoning was employed to support this proposition. In the *first* place, cautioners in suspensions, cautioners in contracts of marriage, cautioners in loosing arrestments, cautioners in annual prestations, and, in general, cautioners *ad faciendam præstandam*, are none of them intitled to the privilege of the statute. The statute relates only to cautioners in bonds for borrowed money: and the question is, Whether it comprehend all cautioners of this sort, or only a certain species of them? This question is pretty nice; but it will be cleared by inquiring into the motives which introduced this statute, and by considering the words of the statute itself.

One thing must be obvious at first view, that the prejudice to families by the cautionary-obligements first named, was not respected as sufficient to intitle the cautioners to any privilege. A different thing

thing was in the view of the legislature. Money has all along been a scarce commodity in this country: and it is too well known by experience, that when a man is pinched for want of money, he will submit to any conditions, however hard, to come at it. This has occasioned many laws to restrain rigorous creditors, and to protect persons who want money, from the hardships that will be imposed upon them by those who have money to lend. Is it not a rational conjecture, that the same motive introduced the act 1695? When people are pinched for want of money, it is extremely difficult for friends and relations to avoid giving their credit. This is the facility that is spoken of and guarded against in the statute. After the money is borrowed, the call is not so urgent for friends to interpose, where the purpose is only to save the debtor from execution. Tenderness frequently, and shame almost always, are sufficient to protect a debtor from being thrown into jail, except upon the most urgent occasion. And as for other executions, they are not extremely tremendous to most people. The difference betwixt these two is so well ascertained in common life, that, for one man who interposes to save his friend from being destroyed by execution, fifty interpose to procure money to their friends.

That this was the sense of the legislature, may be put beyond dispute, from this consideration, that, if it had been intended to communicate the privilege to cautioners binding *ex post facto*, it is impossible to give any rational account why the law should stop short, and not extend the privilege to all cautioners whatever. For instance, is there not a strong call upon a man to interpose his credit in the loosening of an arrestment, which bars his friend from touching his own money, by the want of which he is extremely pinched? This case approaches very near to that of the statute. Another instance is a cautioner in a suspension: if the statute intended to guard against the facility of interposing for a friend, to save him from execution, a cautioner in a suspension ought not to be excluded. What shall be said with regard to a cautioner in a bond of presentation? Is not the call here for a friendly interposition, more urgent than to become cautioner in a bond of corroboration; perhaps before execution is commenced.

It is no answer to say, that the cautionary-obligations now mentioned, are *ad facta præstanda*. For the plain question is, what degree of facility the law had in view to guard against? Had the legislature reckoned upon the terror of execution as an overpowering motive, to force men unwillingly to interpose their credit, it would not have failed to provide a remedy in that case, as well as where men interpose to relieve their friends when they want money. But it was known by experience, that the one situation is not so ready to work upon the facility of men as the other. Therefore it was proper to provide a remedy in that case where the danger is the greatest, without providing a remedy in the other case, where the danger is less, and cautionary-engagements less frequent. And to shew the difference

difference betwixt these two cases in still a clearer light, let it be considered, that few are of so extensive credit as to command, without a cautioner, all the sums they may have use for. This makes the interposition of cautioners, when money is borrowed, extremely frequent. But as it is reckoned a disgrace for a man not to be able to pay what he borrows, it is but with a bad grace that one seeks his friend's credit to save him from execution: and accordingly, partly for this reason, and partly for that formerly mentioned, the interposing *ex post facto* is much less frequent than of interposing at the loan of the money.

The act of parliament, attentively considered, will be found to give relief to no cautioners, but to those who are bound in the original bond. There are only two clauses in the statute of importance in the present question; the one statutory, the other explanatory. The statutory clause is in the following words: "Statutes and ordains, That no man binding and engaging for hereafter, for and with another conjunctly and severally, in any bond or contracts for sums of money, shall be bound for the said sums, for longer than seven years after the date of the bond; but that, from and after the said seven years, the said cautioner shall, *eo ipso*, be free of his caution." As this is the only statutory clause in the act, it must regulate the whole; and it is extremely clear that it regards only cautioners who become bound at the borrowing of the money. The next clause referred to, is no more but explanatory of a doubt that might arise upon the statutory clause now recited: no cautioners are intitled to the privilege but those who are bound in the original obligation: but then, with regard to the creditor, it might be extremely uncertain which of the obligants was to be considered by him as principal, and which as cautioner. To ascertain this point, the following clause is added; "And that, whoever is bound for another, either as express cautioner, or as principal, or as co-principal, shall be understood to be a cautioner, to have the benefit of the act: providing that he have either clause of relief in the bond, or a bond of relief apart, intimate personally to the creditor, at his receiving the bond." This clause, intended for no other purpose but to distinguish the cautioner from the principal, cannot, by any just interpretation, be supposed to comprehend any case but what is expressed in the statutory clause. And so the sense of the whole comes clearly out thus: "Where two or more join in borrowing a sum of money, and grant their bond conjunctly and severally, the person who is declared to be cautioner in the bond, or has a bond of relief apart intimate to the creditor, shall be understood a cautioner in the sense of the statute, so as to have the privilege of the septennial prescription."

Further, there is evidence sufficient from the latter clause itself, that the legislature had no cautioner in view but him upon whose credit the money is borrowed. "It talks of a clause of relief in the
"Bond,

“Bond, or a bond of relief intimated to the creditor at his receiving “the Bond.” These expressions evidently refer to an original contraction, and do by no means agree to a cautioner acceding *ex post facto*. The bond of relief must be intimated personally to the creditor when he lends his money and receives his bond; or there must be a clause of relief in the bond when delivered to the creditor. Here, plainly, there is nothing in view, but what is in the statutory clause; no new fact, nor any provision for such.

“The Court, without entering into any one of the specialities “which had been suggested by the pursuers, repelled the defence of prescription for the following reason singly; That “no cautioner has the benefit of the statute, but he who is “bound along with the principal in the original bond; and not “he who accedes *ex post facto*.”

N^o XXXVI.

21st December 1742.

ELIZABETH CAIRNS *contra* CREDITORS OF GARROCH.

B L A N K W R I T.

JAMES CAIRNS of Minnibuie, having two sons, *Alexander* and *William*, did, in March 1694, lend the sum of L. 600 Scots to *Alexander Cairns of Garroch*, taking him bound by his holograph bond to repay the same “to him, the said *James Cairns*, he being in life; “and failing of him by decease, to *William Cairns* his lawful son, “heirs or assignees, secluding executors.” From ocular inspection it appeared, that the bond had been written out with a blank for the name of the substitute, and the words, “*William Cairns* his “lawful son,” are filled up in a hand different from that of the debtor, who was the writer of the bond. *James Cairns* the creditor survived both his sons, the bond remaining in his possession till his death; and then *Elizabeth Cairns*, *Alexander* the eldest son’s only daughter, made up a title to the same by a general service as heir of line to her grandfather. Upon that title, having first obtained a decree of constitution against the representatives of *Garroch* the debtor, and thereafter an adjudication, she produced her interest in a ranking of *Garroch*’s creditors.

The objection moved against this interest was sustained, *viz.* That the service of *Elizabeth*, as heir of line to her grandfather, could not carry the bond; but that her title ought to have been a service as heir of provision. *Elizabeth Cairns* reclaimed against this interlocutor; and, among other particulars, having suggested the above mentioned fact, that the substitution in the bond appeared to have been originally blank, and to have been filled up with a different hand from that of the writer of the bond, the Court pronounced the following interlocutor: “Having considered this petition with

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“ the answers thereto, and bond in question, find, That the same
 “ was originally blank in the substitution ; and that it does not ap-
 “ pear to have been filled up by the debtor, the writer of the bond,
 “ and so must be held still as blank in the name of the substitute.
 “ And therefore find that the right to the said bond is established
 “ in the petitioner’s person by her service as heir in general to
 “ *James Cairns*, the original creditor ; and repels the objection to the
 “ adjudication at her instance.”

As the bond in question did not fall under the sanction of the act 1696 concerning blank deeds, which has no retrospect, the following is a summary of the arguments used by the creditors in reclaiming against the said interlocutor. The checks which have from time to time been introduced in our law with regard to writings, such as designing the writer and witnesses, the subscription of the witnesses, &c. are all of them calculated for the sole end of guarding the lieges from being made liable upon false or forged deeds. If it be ascertained, that the deed is true and honest, with regard to the debtor, there is no occasion for any clerk with regard to the creditor ; because there cannot readily occur any imposition upon him. The case of blank bonds is a plain proof of this proposition. A bond blank in the creditor’s name, while it remains in that shape, is obviously null ; for there can be no obligation without a creditor, more than without a debtor. But this objection is easily removed by filling up the possessor’s name as creditor, or any other name the possessor pleases ; and it never has been reckoned of any consequence what hand is employed to fill up this blank. The first statute requiring the writer to be designed, is in the 1593, probably before blank bonds were known : if, by this statute, the inserter of the creditor’s name must be designed, such a regulation would be a total bar to blank bonds ; for surely a bond cannot be better where the creditor’s name is left blank, than where it is inserted by whatever hand. In a word, the creditor’s name is none of the essentials of the deed, to require the hand of the writer of the deed ; but, before the act 1696, discharging blank deeds, might be filled up *a quocunque*. And if such was the practice, notwithstanding the statute 1593, appointing the writer’s name and designation to be inserted in the body of the writ, the statute 1681 could make no alteration, since it goes no further than to declare that the want of the designation of the writer and witnesses shall not be supplyable : and, in fact, blank bonds continued current after the 1681, as well as before.

Thus the whole checks contrived by our statutes, tend singly to guard the lieges from being made liable upon false deeds, and not to secure creditors in the possession of the just rights they have by deeds done in their favours : a blank bond may be as readily abstracted, and a wrong name filled up, where it is accompanied with all the checks, as where it is deficient in all. There was no remedy for this evil but care and close repositories, till the act of parliament 1696, prohibiting these securities altogether.

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The creditors endeavoured to apply this argument to the case in hand, by observing, that there is no reason for any solemnity in writing the name of a substitute, more than in writing the name of the institute or creditor; that there is no law ordaining either to be done with any degree of solemnity; and, therefore, that the name of the substitute, like that of the institute or original creditor, may be filled up with any hand; provided only it be done by the authority of the creditor.

There are many instances of dispositions *mortis causa*, with the disponent's name filled up *ex post facto*; not by the writer, but by the disponent. With regard to such deeds, it has often been made a question, whether it was to be presumed that the disponent's name was filled up *in liege poustie*, or on death-bed? but it was never imagined to be a nullity that the blank was not filled up by the writer of the deed. And yet it will be difficult to fix the precise boundary betwixt a disposition *mortis causa*, and a substitution; and no less difficult to assign a good reason for requiring more solemnity in inserting the name of a substitute, than of a disponent.

The only objection against blank substitutions filled up by the creditor, or by his authority, is, that were they indulged, the salutary law of death-bed would be totally evaded. But, in the *first* place, this objection must equally strike against all blank deeds whatever: a man executes a disposition of his land-estate *in liege poustie*, blank in the disponent's name, the filling up the blank upon death-bed will elude the law of death-bed, as well as the filling up a blank substitution: an heritable bond blank in the creditor's name may be filled up upon death-bed. And even a moveable bond blank in the creditor's name, is liable to the same objection; because the privilege of the law of death-bed is competent to the children for their legitim, as well as to the heir. And accordingly, if this argument prove any thing, it proves too much; because it strikes against all blank deeds whatever. *2do*, The argument, at any rate, cannot go so far, as to void all such deeds upon account of the danger of eluding the law of death-bed: such a consideration might be a motive with the legislature to make a law, but with a judge can have no further effect, than to infer a presumption that the blank was filled up upon death-bed; unless the contrary be made out from circumstances, or by evidence. At the same time, it must be observed, that the Court has not even gone so far as to establish such a presumption. The cases that have occurred, have been determined upon circumstances, inferring, either that the blank has been filled up *in liege poustie*, or on death-bed. For example, in a late case betwixt *Keith of Bruxie* and *Mary Seton*, where a disposition granted in the 1693 of the disponent's whole estate, originally blank in the disponent's name, and filled up with the name of *Thomas Seton of Menzie*, being challenged upon the head of death-bed, the Court, the 25th June 1736, " Found " that the disposition challenged was, at signing, blank in the disponent's name; and in respect of the tenor of the disposition, and " that

“ that it did not appear till long after the granter’s death, found it
 “ not presumed to have been filled up or delivered when the granter
 “ was *in liege poustie*; therefore sustained the reason of reduction, un-
 “ less the user of the disposition would prove, that the same was fill-
 “ ed up or delivered by the disposer or his order while he was *in*
 “ *liege poustie*.”

The petition, notwithstanding, was refused without answers.

N^o XXXVII.

15th December 1742.

ROBERTSON *contra* Mrs JEAN KER.

T E S T A M E N T.

IN the reduction of a testament, a proof of circumstances being admitted, the following facts came out, *1mo*, The writer of the testament got not his directions from the testator, nor had any communing with him, but had a note of the heads put into his hand by a friend of the testator’s, to be his direction for writing out the testament, which he immediately did in the testator’s house, and delivered the testament ready for signing, to the same person from whom he got the note. *2do*, The testament was not read over by, or to the testator, in presence of the testamentary witnesses; but was signed by him without reading at the time of subscription.

Upon this proof it was *objected*, that there was no evidence by witnesses, either that the testator gave orders to write this testament, or that he ever perused it after it was writ.

It was *answered*, That this would be a solid objection against a deed executed *in extremis*, where the facility of imposition makes the bare subscribing of a deed not a sufficient legal evidence of its being the deliberate act of the man. But here the testator was of perfect memory and judgment, and so continued to his death, which was about ten or twelve days after executing the testament; and upon that account, the same faith ought to be given to this deed that is given by law to deeds *inter vivos*; which, for the most part, depend upon no other evidence, and require no other, than the bare subscription of the party before witnesses.

“ The Lords repelled the objection.”

N^o XXXVIII.

11th February 1743.

TUTORS of *Straiton contra* WILLIAM GRAY.

P A R E N T and C H I L D.

AALEXANDER JOHNSTON of *Straiton* died 10th of March 1742, leaving a land-estate of seven thousand merks yearly rent to his

his eldest son, an infant, and moderate provisions to his two other children. Upon the 26th of *February* preceding, he executed a nomination of certain persons to be tutors and curators to his children, of whom *William Gray* writer was one, with the usual powers of appointing factors with a salary, for whom they should be answerable. The very day before his death, labouring under the disease of which he died, he granted a factory to the said *William Gray* for levying the rents of his estate, during the pupillarity and minority of his heir, with a yearly salary of fifteen pounds Sterling; taking him bound to account to the tutors and curators.

The tutors judging themselves not bound by this nomination, named a factor of their own, and the matter came to be tried in a multiple-poining raised by the tenants. And, in behalf of the factor named by the tutors, it was pleaded, That a man may indeed leave his estate to his heir in any terms he pleases: but if the absolute property be settled upon the heir, it belongs to him *qua* proprietor to have the management of his own estate. It is therefore a stretch beyond the common law, to support a man's nomination of tutors to his children. The *Patria potestas* among the *Romans* introduced this power, which utility moved us to adopt; and now it is become as it were a branch of the common law. But then, as this power is established by practice, it is limited by the same authority: a mother has no such power, nor a grandfather: it was confined within the years of pupillarity, till it was enlarged by the statute 1696 empowering fathers to name curators to their children, provided the nomination be made in *liege poustie*. And from these premises it was inferred, that though custom originally, and now a statute, authorises a man to name tutors to his children, there is no custom nor authority empowering him to name a factor to his children. It was pleaded in the *second* place, That *Straiton's* nomination of a factor being on death-bed, whatever effect it may have during pupillarity, it can never be longer effectual; for if a man cannot name a curator to his heir upon death-bed, as little can he name a factor.

To the *first* it was *answered*, That the nomination of a tutor, far from being contrary to the common law, is, in reality, a duty imposed upon fathers by the law of nature. No person disputes it to be the duty of parents to take care of their children till they arrive at the years of discretion; and, if the father be prevented by death from performing this duty, he ought to put another in his place. Nor is it against any principle of law, to put under guardianship a child who has neither power nor will to act for itself. And if such be the duty of fathers, the scarcity of good men to chuse for guardians must infer a power of qualifying such a nomination, so as to make up the want of personal merit by good regulations. Accordingly, nothing is more ordinary, nor more natural, in a nomination of tutors and curators, than to fix a quorum, a plan of management, and what omissions shall subject the guardians. In particular, nothing was more usual among the *Romans* than to distribute the ma-

nagement among the tutors, or to appoint one to be the sole manager. And it really implies no more power to appoint one of them to be the factor; which is the present case; or to appoint a factor who is none of the tutors. To the *second* objection it was answered, That this is not the time to determine the question, whether the nomination of *Gray* to be factor must subsist during the minority of the heir? It is enough to say at present, That a factor named by the tutors to act during the heir's pupillarity, ought not to be preferred before a factor named by the predecessor.

" The Lords sustained the factory granted by the predecessor to
 " subsist during pupillarity; and found no necessity at present
 " to determine whether it must subsist after pupillarity, while
 " the heir continued minor?"

N^o XXXIX.

February 1743.

JACK *contra* HALYBURTON.

M I N O R.

ROBERT WEIR, March 1669, executed a disposition of his heritable and moveable effects, in favour of his second wife, *Bethia Glen*, under this express provision, " That the same shall noways prejudice his sons of the first marriage, *Thomas* and *Alexander*, of the sum of seven thousand merks provided to them in their mother's contract of marriage, nor prejudice the granter's just and lawful creditors; but that they shall have right to satisfy themselves out of the subjects disposed, saving always to the said *Bethia* her preference for payment of the annualrent of six thousand merks provided to her in her contract of marriage." This right came by progress into the person of *John Scot*, an infant, to whom *Patrick Scot*, writer in *Edinburgh*, was tutor nominate. There was an easy method laid down by law for the management of this fund, as well as of the other funds which descended to the pupil from his father. The disposition by *Robert Weir* to his wife was not with the burden of debts, nor did the acceptance make the disponent personally liable. The tutor therefore, after making up proper titles in his pupil's person, had a safe course to pursue, which was to convert the effects into money, for paying the creditors in the first place; and if there was any surplus, which could not now appear, the pupil had it free to himself without being subjected personally to any obligation. But instead of this course, the tutor entered into a very extraordinary transaction with *Thomas* and *Alexander Weirs*, which was, " That they should make up titles to their father's heritable and moveable estate, and convey the same to *John Scot* the pupil, in order to fortify the right he already had by the said disposition; that
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“ the tutor, in name of his pupil, should grant them a bond to relieve them of all their father *Robert Weir*’s debts, and another bond corroborating the 7000 merks due to them by their mother’s contract of marriage, and binding his pupil to pay the same ;” and this transaction was completed by executing the several deeds covenanted. The tutor’s management in other branches was not less arbitrary, by selling some houses which belonged to his pupil at short hand without authority of a judge, and without leaving any document to show what became of the price.

When *John Scot* came to be of age, there was no remaining vestige of any moveable effects ; and his heritable effects were all possessed by his adjudging creditors, for sums above their value. Being thus reduced to indigence, he had neither knowledge nor credit to obtain redress from his *quondam* tutor ; and he gradually lost all hopes of retrieving his circumstances.

The creditors had all of them led adjudications in the years 1680, 1681, and 1682, during *John Scot*’s minority ; and, among the rest, *Thomas* and *Alexander Weirs* led an adjudication for the balance remaining due to them of the 7000 merks contained in the tutor’s bond of corroboration above mentioned. From that period, the time was wasted in trifling disputes among the creditors, without bringing matters to any conclusion. In the year 1740, it was objected against this adjudication, now in the person of Mrs *Haliburton*, that the transaction upon which it was founded could not be justified by any motive, whether of necessity or utility ; that it was in its nature a dangerous transaction, as it subjected the pupil to all *Robert Weir*’s debts ; in short, that it was at best an arbitrary transaction, which even the extraordinary powers of a tutor cannot support ; that it is null and void as *ultra vires*, and therefore that an adjudication founded upon it is null and void ; or, taking it in the most favourable light, that it is at least an exercise of the extraordinary powers of a tutor, and therefore not effectual in law, unless evidence be given of *utiliter gestum*. The Lord Ordinary having repelled this objection, in regard that the prescription of 40 years was run without bringing any challenge by a process, the other creditors reclaimed ; and the substance of their argument was as follows. They set out with distinguishing betwixt the ordinary and extraordinary powers of a tutor ; under which last head it was an agreed point, that the transaction fell.

A deed of ordinary administration is *per se* valid and effectual, and must therefore stand, unless the minor undertake to show lesion. A deed of extraordinary administration is not valid and effectual of itself, but must be supported by evidence, that it was *utiliter gestum*, or *in rem versum*. The party who contracts with the pupil, by intervention of the tutor acting in his extraordinary capacity, comes thereby to be subjected, as well as the tutor is, to justify the deed, without which he cannot make the same effectual against

against the pupil. The reason is obvious: the pupil is not bound by such a deed, unless the rationality of it be clearly evinced; and therefore whoever insists upon the deed, must be subjected to bring this proof.

The application of this doctrine to the point in hand is obvious. A deed of ordinary administration is effectual in law, and must be attended with every legal effect consequent upon such a deed, 'till it be taken out of the way by a reduction, in which it is incumbent upon the minor to prove lesion. There ought to be a short prescription of such actions, otherways all who deal with minors will be left at utter uncertainty; and accordingly a reduction on minority and lesion is confined by law to the *quadriennium utile*. But with regard to acts of extraordinary administration, which of themselves are not valid and effectual in law, but require to be supported by a proof of *utiliter gestum*, there can be no occasion to bring a reduction of these upon the minor's part: it is sufficient for the minor to stand upon the defensive; and, when sued upon such deeds, to object, that they are not *per se* effectual in law. It would be against principles, and against the analogy of law, to confine such an objection within any length of time: for it is not in the power of the *quondam* minor to bring this objection when he has a mind; the opportunity is furnished to him no sooner than his party is pleased to bring his action. A better example cannot be given of this than a tutor's borrowing money for the use of his pupil. The minor has no occasion to bring a reduction of this deed: he may wait with security 'till the creditor please to bring his action: it will be then competent to make the objection, that borrowing money is not within the ordinary powers of a tutor, therefore not effectual *per se*, and that the minor cannot be bound unless the creditor prove *in rem versum*. And upon the same plan, a transaction made by a tutor, though of a depending process, which is of all the best reason for a transaction, may notwithstanding be objected to after the *quadriennium utile*; and the objection must be sustained, unless the party claiming under the transaction can justify the utility of it.

More particularly with regard to the defence of prescription, it was observed, that prescription relates to actions, not at all to exceptions or objections. If a man forbear to put in his claim within a limited time, he is understood to have relinquished the same; and after that period, the law refuses to afford him an action: but the using an exception or objection depends not upon the person to whom it is competent, but upon the person against whom it is competent; for, if he bring not his action, there is no place for proposing the objection or exception. Therefore a man can never be said to relinquish an objection or exception, so long as the action is not brought against him. Indeed, after the action is set on foot, he must put in his defence *debito tempore*, or he will be cut out. And thus it comes, that the only proper limitation or prescription of exceptions or objections is competent and omitted. The objection therefore that is here moved, cannot be barred by the 40 years prescription;

prescription; and as little by the decennial prescription, which bars only the mutual claims betwixt the tutor and pupil, and not any objection competent to the pupil, when he is charged for performance of a deed granted by the tutor.

In answering this objection, it was premised for Mrs *Halyburton*, that the challenges which lie against a deed are of two kinds: they either import that the deed is null and invalid, that is, that the deed is not *per se* effectual in law; or, resolve into grounds of reduction, which suppose the deed to be good in law, and of itself effectual to produce an action, 'till it be taken out of the way by the sentence of a judge. Challenges of the first sort are proponable by exception or objection: challenges of the latter sort cannot be proponed but by a process. Hence all objections which resolve into grounds of reduction, are the subject-matter of prescription; for an action of reduction is not privileged against prescription, more than an ordinary action. If a party have no occasion to reduce, the objection or exception competent to him may be effectual, at whatever distance of time the action be brought; but if a reduction be necessary, he must bring it within 40 years, otherways give up his claim. In the present case, were it the intention of Mrs *Halyburton* to subject the pupil or his representatives personally, the foregoing objection proponed by them against a process for payment at her instance, would undoubtedly be sustained: but the present case is an objection against an adjudication which has stood forty years without challenge; and such an objection, of whatever sort it be, is not competent but in the form of reduction: it is the privilege of all decrees that are *ex facie* formal not to be voided by way of exception, nor otherways than by a proper reduction; and therefore the objection ought to be repelled, even upon the argument urged for the creditors.

“ And accordingly the Lords adhered to the Ordinary's interlocutor.”

N^o XL.

February 1743.

ANDERSON *contra* BEGBIE.

SUSPENSION.

UPON the 6th July 1741, *Begbie* obtained a decree against *Anderson* before the Sheriff of *Edinburgh*. A bill of suspension was presented 14th July, and was passed without answers. Upon the 28th, *Begbie* occasionally hearing that his decree was suspended, put up his protestation in common form. Upon the 29th, the suspension was intimated to him under form of instrument, which bore the date of the suspension, but not the day of comparance. And though a protestation is not usual till the day of comparance be

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past,

past, the charger was advised, that this intimation, silent as to the day of compareance, did not oblige him to withdraw his protestation. It continued in the minute-book, and no party appearing in behalf of the suspender to have it scored, he extracted the same after it was read in the minute-book.

The suspender entered a formal complaint of this proceeding as irregular, upon the following medium: "That, by constant practice, the day of compareance in a suspension is always fourteen days after the date of the letters; and therefore though the day of compareance was not intimated to the charger, yet as the date of the letters was intimated to him, he must have known that the day of compareance could not be before the 28th, and upon that account was *in mala fide* to put up his protestation until that day was elapsed." This complaint with the answers were remitted to an Ordinary to inquire into the practice, and to report.

For want of precedents in this case, the debate was reported, with the opinion of several members of the Court. It was set forth for the suspender, that his letters of suspension bore a warrant for citing the charger to compare the first of *November* then next; superseding the decree, and execution thereof, till the 10th of the said month; and that though the intimation did not contain the day of compareance, yet that the charger was put in *mala fide* to enter his protestation before the day of compareance, because, knowing the suspension, it was his duty to inquire about the day of compareance, which he had access to do at the Signet. At least he could not put it up before the 29th *July*, because of the constant practice, that the day of compareance in a suspension is always fourteen days after the date of the letters. And to support this reasoning, he produced several declarations from members of Court.

The charger, to justify the step he had taken, attempted to deduce this matter from its origin. A suspension is a summons, in which warrant is granted to messengers at arms, to cite the charger to compare in court at a certain day; and, in the mean time, the letters declare the charge to be suspended, and also for ten days after the day of compareance; which time it would seem was thought sufficient to try the verity of the reasons of suspension. Such is the style of a suspension to this day. While a suspension had but this temporary effect, there could be no need of a protestation to call for a suspension; if the suspender got not his suspension called within ten days of the day of compareance, the suspension was at an end of course.

But this form became obsolete; when, and upon what account is a part of the history of our law, of which we have scarce any traces in our law-books; only it would appear not to be altogether out of use so late as Sir *George Mackenzie's* days, who observes, "That the effect of a suspension is to stop the execution of sentences for a time." Institute, book 4. tit. 3. § 2. But by whatever means the alteration has happened, a suspension at present is a stay of diligence
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till it be discussed; and as it is not the suspender's interest to discuss his suspension, this new effect given to it makes it necessary for the charger to get the stay to his diligence removed, by having the suspension discussed. This introduced a new form, which is, that the charger must call for the suspension, by putting up a protestation in the minute-book.

During the period that a suspension had no effect beyond a limited day, it was necessary for the suspender to follow out the will of the letters, by citing the charger to appear in court at the day named in the letters, in order to have his suspension called, and his reasons of suspension sustained; for, if this was neglected, the stay was at an end by the elapsing of ten days after the day of compearance. But now that a suspension has the effect of staying execution till it be discussed, though not called nor brought into Court, the suspender has no occasion to cite the charger according to the will of the letters, unless with the view of intimating the suspension to him: and as suspensions pass upon bills, which are generally appointed to be answered, this appointment brings the charger into Court, who thereafter cannot be supposed ignorant of the fate of the bill whether it pass or be refused, which makes intimations in a good measure unnecessary; because when a suspension has passed upon bill and answers, the charger will not venture to go on with his diligence, 'till he extract a protestation. And when a bill is past without answers, of which the charger may be in probable ignorance, even there it has crept in by degrees to be thought sufficient to intimate the suspension to him under form of instrument, without necessity of a regular citation by a messenger.

Where a suspension is passed after answers are given in to the bill, the charger who gives in the answers, is thereby put *in mala fide* to go on with diligence, 'till the suspension be taken out of the way by a protestation; at the same time, it is not understood as any part of his duty to search the signet-books for the day of compearance; and therefore, where the day of compearance is not intimated to him by the suspender, he may put up his protestation at random; against which the suspender's remedy is to have the protestation scored, if entered before the day of compearance. This is the constant practice; and if there be no application for scoring the protestation, it is held to be regularly extracted, though put up before the day of compearance.

But then, says the suspender, "The date of the suspension was intimated, and as never fewer than fourteen days are allowed for the day of compearance, the charger was *in mala fide* to put up his protestation 'till after the fourteen days were elapsed." And it is true, that, by this reasoning, the charger put up his protestation too early by one day.

In answer to this argument, it was urged in the *first* place, That there is no certain time fixed by law or custom for the day of compearance. On the contrary, Lord *Stair*, book 4. tit. 52. § 35. handling this subject, has the following words, "That this day ought to
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“ be according to the distance of the parties, that there may be sufficient time to use citation.” And as the parties here were near neighbours, the charger an indweller in *Edinburgh*, the complainer in *Leith*, the very shortest day might suffice, and so the charger was *in bona fide* to believe that the day of compearance might be elapsed when he put up his protestation. In the *second* place, Supposing fourteen days customary as the shortest time, then the 28th of *July* might be the day of compearance, and it was lawful for the charger to put up his protestation that very day. With regard to this, the suspender is in a mistake, when he supposes, that protestation cannot be put up ’till the day of compearance be past. The contrary will be plain upon considering the nature of a protestation. What gives rise to this judicial step is, that a party is called to compear upon a certain day to answer, &c. He compears accordingly, but his party does not appear to lay any claim against him. Upon this, it is lawful for him to take instruments in the clerk’s hands upon his compearance, and to protest that he shall not be bound to compear a second time without a new citation. This is the meaning of a protestation; and it is evident from the very nature of it, that it may be put up upon the day of compearance.

“ The defender was assilzied, because of the common practice;
 “ but the Lords talked of an act of sederunt to regulate this
 “ matter.”

Nº XLI.

22d *June* 1743.

CRAWFURD *contra* MITCHELL.

LIFE-RENTER.

BY contract of marriage betwixt *James Hogg* and *Elizabeth Mitchell*, dated the 18th of *March* 1741, he became “ bound to lay
 “ out the sum of L. 166 : 13 : 4 Sterling, with the sum of L. 186,
 “ his wife’s tocher, upon land, bond, or other sufficient security,
 “ and to take the rights in favour of himself and *Elizabeth Mitchell*
 “ in conjunct fee and liferent, for the said *Elizabeth Mitchell* her
 “ liferent use allenary, and of the children to be procreate of the
 “ marriage in fee; and, failing children, the foresaid sum of
 “ L. 166 : 13 : 4, to *James Hogg*, his heirs and assignees; and the
 “ other sum of L. 186 Sterling, to the said *Elizabeth Mitchell*, her
 “ heirs and assignees.” And, on the other part, “ the said *Elizabeth*
 “ *Mitchell*, in name of dote and tocher, assigned and made over in
 “ favour of the said *James Hogg* and herself in conjunct fee and life-
 “ rent, for her liferent use allenary, and to the children of the mar-
 “ riage in fee, the said sum of L. 186 Sterling, contained in a bond
 “ granted to her by her brother *William*. And lastly, Execution is
 “ appointed to pass upon the contract for implementing the con-
 “ ditions

“ditions in favour of the wife and children, at the instance of *Alexander Coupar* minister at *Traquair*, and the said *William Mitchell*.”

The sum in this bond being arrested by a creditor of the husband's for payment of L. 35 Sterling, the defence made in the furthcoming for *William Mitchell*, who was both debtor and trustee, was, that the sum in this bond being liferented by the wife, he could not be bound to pay any part of it without her consent, unless the husband were ready instantly to lay it out with his own money upon sufficient security to himself and his spouse in conjunct fee and liferent, in terms of the contract of marriage; that he was however willing to pay to the husband's creditor what fell under the arrestment, provided caution was found for the wife's total liferent. The Court found, “That the sum of L. 186 due by *William Mitchell* being assigned by *Elizabeth Mitchell*, in her contract of marriage with *James Hogg*, to herself in liferent, the said *William Mitchell* her brother, and trustee for execution of the contract, cannot be obliged to make furthcoming to the pursuer any part of the principal sum due by him, unless the pursuer shall find caution for the whole liferent provided to the said *Elizabeth*, in case of her survivance.”

The creditors reclaimed, insisting, that the assignment of the tocher made the husband liar; that when a tocher is absolutely dispoised, the husband or his creditors may uplift the same, leaving the wife to claim performance from her husband of what is covenanted on his part; that when it is dispoised to him, with the burden of the wife's liferent, he and his creditors may uplift the same, as in the former case; with this difference only, that they must find caution to make the sum uplifted furthcoming to the wife for her liferent, in case of her survivance; and that at any rate it is unreasonable to oblige a creditor who claims only L. 35, to give security for the total liferent.

At advising this petition, *Elcbies* thought the interlocutor wrong in two respects: first, That the wife having made over her bond to her husband and herself in conjunct fee and liferent, it was no more in the power of the husband or his creditors to change her security by substituting caution in place of it, than it is in a man's power, when his wife's liferent is secured upon land, to make her give up her real right, upon offering to give her other lands for her security; and therefore that *Mitchell*'s bond must remain as it is, till the husband be ready to lay out both it and his own money in terms of the contract. He thought it wrong for another reason, That if caution were at all to be accepted, it ought to go no farther than to answer for the sum which was claimed to be made furthcoming upon the arrestment. It was the President's opinion, that the sum could not at all be uplifted, even upon offer of caution, unless it could be qualified, that the debtor was *vergens ad inopiam*, in which case the Court might interpose *ex nobili officio*. But he observed, that the interlocutor was framed upon a concession made by the defender, of allowing the sum to be uplifted upon caution for the wife's total liferent.

rent. Upon which the vote being put, it carried, by a narrow plurality, to refuse the petition.

N^o XLII.

6th July 1743.

RAMSAY *contra* HOGG.

BILL OF EXCHANGE.

UPON the 6th of May 1742, *Andrew Simson* drew a bill for L. 60 Sterling upon Messrs *Skinner* and *Simson* merchants in *London*, payable 40 days after date to *William Hogg*, merchant in *Edinburgh*, or order. This bill, which was indorsed to *James Ramsay*, became due on the 15th June; and, reckoning the three days of grace, was payable the 18th. Upon the 19th, and no sooner, it was protested for not-acceptance and not-payment at the same time. *William Hogg*, being charged for recourse, suspended upon want of due negociation, in respect that the bill ought to have been protested for not-acceptance when it became due. *Answered*, The dishonour of the bill was notified to the suspender within fourteen days after it was due, being notified the very day of the protest, which, with the bill, was returned by post, and intimated to the suspender. And therefore whatever be the practice, the suspender can take no advantage of the delay, since notice was given him of the dishonour of the bill, as soon as it was incumbent upon the indorsee to give notice; even supposing a protest to have been taken upon the day of payment. *Replied*, The form of negotiating bills, which is established by practice, admits of no latitude: strict rules must be observed to prevent law-suits among merchants; and did loss or damage come at all under consideration in a case like the present, it is enough for the suspender to say, that a protest for not-acceptance taken in due time might have procured payment from *Skinner* and *Simson*.

“ In respect there is no evidence brought, that the *London* practice
 “ with regard to bills of exchange differs from the practice of
 “ this country, which is, that bills must be protested for non-
 “ acceptance on or before the day of payment; find, That the
 “ charger can have no recourse against the suspender.”

N^o XLIII.

July 1743.

COCHRAN of *Bridgehouse* *contra* Representatives of Colonel VANSE.

ANNUAL RENT.

THE following question occurred in a process, Whether denunciation at the market-cross of *Edinburgh* is sufficient to make a sum bear interest, being sufficient for caption, though the debtor live
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not within the jurisdiction? For the affirmative it was argued, that *Edinburgh* is *communis patria*, and therefore is the proper place for all notifications to the lieges in general; that denunciation upon a horning is a proclamation addressed to the lieges in general, "discharging " to receipt, supply, maintain, or defend such a man, our sovereign " Lord's rebel, being at the horn, &c." and therefore the proper place of this denunciation is at the market-crofs of *Edinburgh*: that it having been the sheriff's province, before gifts of escheat were introduced, to gather in the moveables of rebels for the King's use, the practice crept in to denounce at the head-burgh of that shire where the rebel's moveables lay, as a more special notification to the sheriff to do his duty; therefore in order to escheat, a denunciation at the market-crofs of the shire is necessary; but to all other purposes, intercommuning, caption, annualrent, &c. a denunciation at the market-crofs of *Edinburgh*, addressed to the lieges in general, is the proper form.

For the negative, the act 20th, parl. 1621, was set furth, ordaining, " That whensoever any person is denounced rebel, and put to the " horn for not-payment of sums of money, the person so denounced " shall be subject in payment of annualrent." And that the denunciation here must be a regular denunciation at the market-crofs of the shire, was endeavoured to be cleared by the following considerations: 1^{mo}, By the common law of this land, the sheriffs were the proper and only officers to execute the King's orders in matters of law, each within his own jurisdiction; and even acts of parliament, which require the most general notification, were published in this manner, 1st statute *Robert I.* cap. 34. and act 67. parl. 1425. Proclamation at the market-crofs of *Edinburgh*, of acts of parliament, as a sufficient publication instead of proclamation at the head burghs of shires, was introduced by the act 128. parl. 1581, which of itself makes it evident, that all denunciations were originally at the head-burghs of shires. 2^{do}, *Edinburgh* is *communis patria* or *commune forum* to parties out of the country, but not to those who live within it, each man being subject to the jurisdiction of his own sheriff. 3^{tio}, The style of all letters of horning, as *Stair* mentions, book 4. tit. 47. § 8. was, " That the messenger pass to the market-crofs of the head-burgh of " the jurisdiction within which the party dwells, and there denounce " him rebel," which is sufficient evidence of what was the common law of the land, though of late years this style has been abridged, and no more commonly expressed than " to denounce the party rebel, and " put him to the horn."

From these considerations it appearing, that denunciation at the market-crofs of the shire is the regular denunciation, it was inferred, that this denunciation must be understood in the act 1621, and not denunciation at the market-crofs of *Edinburgh*; an innovation which has probably been introduced by the Court of Session in order to facilitate captions.

" Found,

“ Found, That a denunciation at the market-cross of *Edinburgh*
 “ against a person not living within the jurisdiction, has not the
 “ effect in law to make a sum bear interest.”

N^o XLIV.

July 1743.

ALEXANDER HOME-CAMPBELL Supplicant.

PERSONAL EXECUTION.

THE House of Lords having reversed a sentence of the Court of Session with regard to *John Sinclair* writer in *Edinburgh*, “ ordering and adjudging, that the said *John Sinclair* do forfeit and pay to the appellant the sum of L. 500 Sterling; and further ordering, that the Court of Session do give all the necessary and proper directions for carrying this judgment into execution,” the appellant *Alexander Home-Campbell* applied to the Court of Session, praying for a warrant to cite the said *John Sinclair* that he might be heard, and to decern for payment of the said sum awarded by the House of Lords.

A doubt arising among the Judges about the competency of such a summary application, instead of a regular process, they appointed precedents of the Court to be laid before them, which was accordingly done. And this produced an additional petition, praying now to have a warrant for letters of horning, for the following reasons: *1mo*, By the law of *Scotland*, the decrees of every judge who has authority and jurisdiction within this kingdom, are intitled to the privilege of summary execution. By the present constitution of this part of the united kingdom, the House of Lords standing in place of the *Scotch* parliament in matters of appeal, they must have all the powers, in such matters, which the *Scotch* parliament enjoyed. And in fact they exercise these powers every day, by decerning, ordaining, and adjudging. In the present case, they have “ ordered and adjudged, that the said *John Sinclair* do forfeit and pay to the appellant the sum of L. 500 Sterling,” which is a clear decerniture for a liquid sum, capable to be put directly in execution. And as the House of Lords have a complete jurisdiction in *Scotland*, so far as concerns causes brought before them by appeal, there can be no reason, why the judgment pronounced by them should not be put directly to execution: and to say that such a decree requires the interposition of the Court of Session, is, in other words, to say, that the House of Lords have no direct or immediate jurisdiction in *Scotland*. *2do*, In the decree itself it is ordered, “ That the Court of Session do give all the necessary and proper directions for carrying this judgment into execution.” What is this, in other words, but ordering that the Court should direct letters of horning and poinding, or other proper executorials? For it is the judgment of the House of Lords, which

which must be carried into execution; and yet if a process be necessary, it would be the judgment of this Court which would be carried into execution, not the judgment of the House of Lords. *3tio*, With regard to the precedents of this Court, there is not a single instance where a new process was found necessary: the form has always been, that if a depending process was removed to the House of Lords by appeal, the parties, after discussing the appeal, took up the process where it left off, and proceeded to obtain a final determination; and that a summary application was always admitted, where a cause finished in this Court was carried to the House of Lords. *4to*, No defence can arise to *John Sinclair*, but that of payment, which he has access to propone in a suspension; but the possibility of such a defence ought no more to be a bar to a charge of horning in the present case, than it is in ordinary cases.

“ The Lords pronounced a decree; and avoided granting letters
 “ of horning, for no better reason than that a decree was only
 “ demanded in the first petition.”

N^o XLV.

July 1743.

EXECUTORS of the Earl of LONDONDERRY *contra* Earl of STAIR.

W I T N E S S.

IN the year 1720, the Earls of *Londonderry* and *Stair* gave bond to *Frederick Frankland* for a considerable sum; and, of the same date, the Earl of *Stair* gave to the Earl of *Londonderry* a bond of relief or indemnification. After the Earl of *Londonderry*'s death, his executors brought a process against the Earl of *Stair* anno 1740, libelling, that the Earl of *Londonderry* had paid and retired the bond due to *Frederick Frankland*; and concluding, that the defender, in terms of his bond of indemnification, should repay the same. For the defender the following fact was set forth, That being in *France* the time of the *Mississippi*, he was unwarily drawn in to deal with the Earl of *Londonderry* in the *French* actions, upon which ground *Londonderry* came to have a considerable claim against him; that the *French* stocks being discovered to be a mere bubble and cheat, *Londonderry* having returned to *London* was ashamed to ask payment directly, but fell upon a stratagem: he pretended to the defender to be in need of a sum of money, and asked him to be surety. The bond to *Frederick Frankland*, which contained pretty much the same sum with the *French* debt, was subscribed by both upon this footing. But, before parting, the defender, instead of receiving a bond of relief, being put in mind of the *French* debt, was prevailed upon to grant the bond of relief to *Londonderry*. Upon this fact the defence was founded, that there was no money advanced upon the principal bond; that *Frankland* had no claim against the Earl of *Londonderry* upon that bond; and therefore

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the Earl of *Londonderry* could claim no relief from the defender of a sum he had neither paid nor was bound to pay. The Court before answer, having ordained *Frederick Frankland's* oath to be taken, and his and *Londonderry's* books to be produced, the pursuers reclaimed, and insisted, that it was the defender's business, in order to make good his defence, to produce *Frankland* to depone, and also to exhibit his books.

In answer, the defender admitted it to be a general rule, That the party who makes the allegation ought to produce his evidence, whether writ or witness; but insisted, that there is no rule without an exception, and that the present case ought to be an exception, for the following reasons: If the defender offer to prove his alledgeance by a writing in the pursuer's own hands, or by a writing which belongs to the pursuer, it is he, not the defender, who must produce this writing. If the witness condescended on by the defender be the pursuer's wife, or servant, or child *in familia*, the pursuer must produce the witness. The same exception must hold in the present case. *Frederick Frankland* is out of the reach of this Court, and the defender has no means to force him to give evidence here; but it cannot be difficult for the pursuer to produce the witness and his books, considering the intimate correspondence, which, by this very process, appears to have subsisted betwixt the Earl of *Londonderry* and him. *2do*, This case must be considered in the same light as if the Earl of *Londonderry*, upon his pretended payment, had taken an assignment to the principal bond, and had made it the foundation of this process. In that case the pursuers must have produced *Frederick Frankland*; because it is a rule, That when the cedent is appealed to to prove a defence, it is the assignee who must produce him, not the defender.

“ The Lords adhered.”

N^o XLVI.

9th December 1743.

DRUMMOND *contra* GRAHAME.

W R I T.

DRUMMOND of *Deanston* having lent 800 merks to *Grabame* of *Mondowie*, who was married to his sister, the document he took for the debt was a bill dated 21st November 1717, in his own handwriting, and regularly accepted by *William Grabame*. This bill was anxiously conceived to make it a firm security; for it bears a doquet in the following terms: “ Signed, date and place foresaid, before “ these witnesses, *John* and *Walter Grabames*, sons to the said *William Grabame*;” and accordingly these two young men subscribe as witnesses. After the death both of the creditor and debtor, a process was brought for payment against the said *Walter Grabame* as representing

presenting his father, whose defence was, That the bill was null, as bearing annual rent and penalty. In order to support the bill against this exception, a proof was demanded, and several witnesses led to prove the circumstances of this loan. When the matter came to be advised, the pursuer insisted upon two topicks; *1mo*, That the foregoing defence did not amount to an *ipso jure* nullity, or *denegatio actionis*, but only to an exception which might be passed from by homologation or otherwise; and that the defender, who is a subscribing witness to the deed, ought to be barred *personali exceptione* from pleading this exception, seeing, in quality of witness, he must have seen his father the debtor subscribe, otherwise be guilty of a crime. *2do*, That supposing the bill not *per se* a sufficient evidence of the debt, yet, in conjunction with the proof led, there is sufficient evidence to satisfy the Court that there was a debt, and that the same is resting owing.

To the first it was *answered*, The defender was not above sixteen years old at the date of the bill, and cannot call to remembrance whether he subscribed the bill or not; and therefore cannot be barred *personali exceptione* from pleading the said defence. To the second, There is no sufficient evidence to prove a subsisting debt.

“ It carried, by a narrow plurality, that there is no sufficient evidence of a subsisting debt.”

Nº XLVII.

10th December 1743.

DUNDAS *contra* M'LEOD.

CAUTIO JUDICIO SISTI, ET JUDICATUM SOLVI.

A CAUTIONER *judicio sisti et judicatum solvi* before the Admiral, is not liberated by the defender's dying during the dependence. It was urged in behalf of the cautioner, that a fide-jussory obligation is *stricti juris*, and cannot be extended beyond the terms thereof: that he became cautioner for the defender personally, not for his heirs; and consequently is bound only for what shall be decreed in this action against the defender, not for what shall be decreed in any other action against the defender's heirs. And to prove this, the tenor of the bond of cautionry was appealed to; “ I Roderick M'Leod writer to the signet, bind and oblige me, my heirs and successors, as cautioner and surety, acted in the books of the High Court of Admiralty, for Norman M'Leod Lieutenant in Lammie's regiment, *de judicio sisti et judicatum solvi*, in the action at the instance of Ensign Ralph Dundas and others against him, before the Judge of the High Court of Admiralty.” The answer was in substance what follows. Even in contracts *strictissimi juris* the extent of the obligation is to be gathered from the nature of the transaction, rather than from clauses of style slightly or imperfectly framed, and capable of

of different meanings. In a suit before the Admiral, it is a privilege of every pursuer to demand caution, not only *judicio fisci*, but *judicatum solvi*; the foundation of which is, that strangers being often called in this Court, the prosecutor, before laying out much expence in a tedious process, ought to have some security, in case of prevailing, that his claim shall be made effectual; and therefore the cautionary obligation must be considered as accessory to the claim, and not strictly to be limited to the persons either of the pursuer or defender. If the bond of cautionry be so construed as to release the cautioner where the defender dies before decree, the same must happen where the pursuer dies before decree: so this cautionary obligation would depend upon many chances; without necessity, and indeed contrary to common utility, as chance bargains are contrary to the genius of law.

N^o XLVIII.

December 1743.

AGNES DICKIE *contra* THOMSON, &c.

CAUTIONER.

THE Act of Sederunt 1650 finds and declares, "That all cautioners in suspensions hereafter shall be obliged and liable as validly and effectually as the suspenders are, notwithstanding the charger or suspender shall decease before the discussing of the suspension. And for this effect the Lords ordain, That all bonds and acts of caution to be taken and received in suspensions hereafter, shall bear this clause, obliging the cautioner, his heirs and executors, for payment of the sums or doing of the deeds to the charger, as validly and in the same manner as the suspender, his heirs and executors, are obliged themselves." The form of the bond of cautionry appointed by this act came to be neglected; and of late years bonds of cautionry in suspensions have been conceived in the following terms: "That the cautioner shall pay to the charger the sum contained in the decreet, in case it be found, after discussing of the suspension, that the suspender ought to pay the same." *Alexander Hall*, who had suspended a decree for L. 63 Sterling, recovered against him by *Agnes Dickie* in the inferior court, having died during the dependence of the suspension, his cautioners *Thomson* and *Lang* insisted, that they were free; since, by the terms of their bond of cautionry, they are only liable to pay what shall be decerned against *Alexander Hall* personally, and that now, after his death, there can be no such decerniture against him.

"The Court notwithstanding found them liable in terms of the Act of Sederunt."

N^o XLIX.

N^o XLIX.

December 1743.

AGNES DICKIE *contra* THOMSON and LANG.

A R R E S T M E N T.

IT was pleaded for a cautioner in the loosing of an arrestment, That cautioners, by the law of *Scotland*, have the benefit of discussion, as well as by the *Roman* law; and that a cautioner in loosing of arrestment, is intitled to this privilege by the very conception of his bond; for he only becomes bound for the common debtor, that his goods arrested shall be made furthcoming. On the other hand, it was urged, that caution in loosing of arrestment comes in place of the arrestment; and therefore that the cautioner must be liable in the same manner as the arrestee would be upon a decree of furthcoming recovered against him.

“ Found, That a cautioner, in loosing an arrestment, has not the
“ benefit of discussion.”

N^o L.

4th January 1744.

Sir JOHN BAIRD *contra* Creditors of Mr HUGH MURRAY.

JUS QUÆSITUM TERTIO.

IN the year 1737, Sir *James Rothead* made a settlement of his estate, heritable and moveable, upon certain persons, as trustees for behoof of his heirs therein named. *Hugh Murray*, the only accepting trustee, did, in *December 1737*, confirm the moveables; and, not having leisure to execute the office of executor, he granted a factory to *George Gordon* writer in *Edinburgh*, to uplift the moveable debts, grant discharges, and to account to him for his intromissions. In *September 1740*, Mr *Murray* and *George Gordon* instituted an accompt upon the subject of the factory, by which *George Gordon* came to be debtor to his constituent in the sum of L. 286 Sterling, for which *George Gordon* granted a bill of even date with the fitted accompt, payable to Mr *Murray* or order, and bearing value received; and, of the same date, got a full discharge from Mr *Murray* of his factory, and all obligations arising therefrom. In *March 1741*, Mr *Murray* being about to leave the town, and apprehending that a demand might be made upon him by the next of kin of Sir *James Rothead* for the balance in his hands, for which they had obtained a decree against him as Sir *James's* executor, he lodged in the hands of *Andrew Ghalmer*, his first clerk and ordinary doer, *George Gordon's* bill indorsed blank, with a further sum in money, to answer the said demand, and took from him a declaration in the following terms:

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“ I *Andrew Chalmer* writer in *Edinburgh* grant that *Mr Hugh Murray* advocate has indorsed to me *George Gordon*’s bill to him for L. 286 Sterling and given me in cash L. 123 Sterling, with which two fums I am to pay the fum he is decerned to pay to the nearest of kin of *Sir James Rothead*, and to report him their discharge.” *Sir James Rothead*’s next of kin not having made a demand, the money and bill remained with *Mr Chalmer* till *Mr Murray* died in the state of bankruptcy, when his creditors proceeded to diligence, took out a confirmation, and, among other moveables, gave up in inventory the bill and cash in the hands of *Mr Chalmer*.

Sir James Rothead’s next of kin appeared for their interest, and claimed preference before *Mr Murray*’s creditors, upon this medium, that the bill and cash in the hands of *Mr Chalmer* were subjects especially destinated by *Mr Murray* for their payment.

“ Found, That notwithstanding the money was lodged by *Mr Murray* in the hands of *Mr Chalmer*, under the declaration granted by him, it remained under the power of *Mr Murray*, and might have been called for by him ’till actual application, and applied to what use he pleased; and therefore that the same remained *in bonis* of *Mr Murray*, and that *Sir James Rothead*’s next of kin have no preference.”

N^o LI.

4th January 1744.

Sir JOHN BAIRD *contra* the Creditors of Mr HUGH MURRAY.

SURROGATUM.

HUGH MURRAY, executor nominate, having confirmed *Sir James Rothead*’s moveables, granted a factory to *George Gordon* to levy the moveable debts. *Mr Murray* and *George Gordon* instituted an accopt upon the subject of the factory, by which *George Gordon* came to be debtor to his constituent in the fum of L. 286 Sterling, for which *George Gordon* granted bill of even date with the fitted accopt, payable to *Mr Murray* or order, and bearing value received; and, of the same date, got a full discharge from *Murray* of his factory. After *Murray*’s death, the fum in this bill being confirmed by his creditors, a competition arose betwixt them and *Sir James Rothead*’s next of kin, to whom *Mr Murray* never had accounted for his intromissions with *Sir James*’s moveables. It was admitted for *Murray*’s creditors, that an executor, being but a factor or trustee, can have no ground of competing with the creditors, or next of kin of the deceased, upon any subject which belonged to the deceased; and therefore though an executor take a decree in his own name, or a bond of corroboration in place of a decree, the next of kin are still preferable upon the subject *in medio*. But if an executor levy a fum due to the deceased, and grant a discharge, the money which

which he receives becomes his property ; or, if in place of money, he take a private bond without relation to the executry, the case is the same. The discharge granted to the debtors of the deceased, binds the sum upon the executor ; the money is understood to be in his pocket ; and the next of kin have no concern what he makes of the money, whether he pay his own debts with it, or employ it upon a private loan. The present case is in effect the same : the bill granted by *Gordon* was *Murray's* property ; and had *Gordon* proved insolvent, *Murray* alone would have suffered, and not the representatives of *Sir James Rothead*. It was answered for the next of kin, That the transaction betwixt the executor and his factor, proves that the bill was the produce of the executry ; and the plain consequence is, that the bill ought to be adjudged to them, and not to *Murray* or his creditors. For, from the very nature of a trust, it is evident, that a trustee cannot compete with his constituent, either upon the *ipsa corpora* of the constituent's effects, or upon their produce : and it is a case adjudged, that if a trustee sell his constituent's goods, and take a bond for the price in his own name, the constituent will be preferable upon the bond before the trustee's creditors. Nor ought it to weigh that *Murray* run the hazard of his factor's bankruptcy ; for this hazard he submitted to by naming a factor, which an executor is not intitled to do. If an executor take a bond of corroboration from a debtor of the deceased when payment is offered him in money, this circumstance will subject him to the hazard of the debtor's insolvency ; and yet unquestionably the next of kin will be preferable upon this bond before the creditors of the executor. Or if the executor dispose of the *ipsa corpora* of the moveables, and take a bond for the price instead of ready money, it is very consistent that the next of kin be preferred upon this bond, and the executor at the same time be liable to make it good.

“ Found, that there is sufficient evidence that the sum contained
 “ in *George Gordon's* bill was part of the proceeds of *Sir James*
 “ *Rothead's* executry ; and therefore, that *Sir James Rothead's*
 “ next of kin are preferable for the sum in the said bill before
 “ the other creditors of *Murray*.”

N^o LII.

27th January 1744.

FAIRLIE of *Fairlie contra* Earl of EGLINTON.

PROPERTY.

THE Earl of *Eglinton's* property adjoins to that of *Fairlie* of that ilk, along one side of the river *Irvine* ; and the mill of *Leaths* belonging to the latter, stands upon the said river 540 yards above the march of the two properties. The Earl having erected a mill upon his own property adjoining to the march, and built a dam-dike
 crofs

cross the river, which made the water sometimes restagnate upon Fairlie's mill, Fairlie brought a process, complaining that his mill was hurt by the back-water occasioned by this *novum opus*, and concluding, that the Earl's dam-dike should be demolished, or so altered as not to obstruct the river's running in its ordinary course. The restagnation was a fact not controverted; but it was contended for the Earl, That the raising the pursuer's mill-wheel ten inches, would make the mill go as well as formerly. He offered to defray the expence of this alteration, and urged, that to oppose this expedient, would be to act *in æmulationem vicini*, which the law does not indulge. The Court first pronounced an interlocutor, finding, " That the defender has right to insist that the pursuer's mill may be so altered
 " in its form upon the defender's charges, as that it may be and continue a sufficient going mill; and at the same time the defender
 " have the use of his property by building a mill of his own further down the river, without prejudicing the pursuer's mill, or throwing any damage or loss upon him."

Against this interlocutor the pursuer reclaimed, insisting upon the following topics, *1mo*, No person's property is subjected to the will of another: *in suo hætenus facere licet quatenus nihil in alienum immitat*. There is no other idea of a positive servitude, than that another man's property is subjected to my use; and therefore to say, that I can direct my water upon my neighbour's ground, or throw my stones upon it, is, in other words, saying, that I have a servitude upon it. *2do*, A man cannot be restrained from making use of his own property, or from acting within it, whatever consequential damage may follow to a neighbouring proprietor: I can build a house though it obstruct my neighbour's lights: I can dig a pit, though it drain his well. And the reason is, that for a man to be restrained from acting within his own property, because of a damage thereby arising to his neighbour, is plainly subjecting his property to the interest of his neighbour, which is inconsistent with the principle of independency, and resolves into a negative servitude. *3tio*, Want of interest may limit a man in the exercise of his property, where the exercise is hurtful to others: to do an action in itself lawful, with the view to hurt another, without any benefit to myself, is, in law language, acting *in æmulationem vicini*. On the other hand, I am not intitled to make free with my neighbour's property, however beneficial to me, and however innocuous as to him. The reason is, that interest is in no case the parent of right: interest alone can never give me the smallest power over another's property, more than it can give me the property itself.

To apply these principles to the present case, the defender maintains that he is intitled to alter the form of the pursuer's mill, as being noway hurtful to the pursuer, and beneficial to him the defender, by procuring him liberty to restagnate the water. As this, in effect, is claiming a power or right over the pursuer's mill, we must examine where this power or right is founded. The pursuer is

is absolute proprietor of his own mill, which excludes any sort of power in another. Now, if interest alone without any other consideration, be sufficient to bestow a power over another man's actions, or over his property, supposing the restraint not to be detrimental in any pecuniary view, it must follow, that my neighbour's property in all cases must be subjected to my interest, unless he can specify an opposite pecuniary interest; which certainly will not be maintained. I have no right to plant a hedge in my neighbour's field, however beneficial to him as well as to myself. And were I to gain a million by driving a level through his ground to drain a silver or copper mine, the law will not give me liberty without his consent: it would signify nothing though I should offer to drive the level below ground, and preserve the surface entire. It is the great privilege of property, that the proprietor can be put under no restraint: a man's mind is his kingdom, and the law cherishes freedom and independency, making every man arbiter of his own actions and property, without any other limitation than that of abstaining from doing harm to others. If the rule be once established that a man has power over his neighbour's property to work upon the same, or to alter it for his own benefit, provided the neighbour suffer not, there is no possibility to stop short: the power over his neighbour's property must take place even where the neighbour suffers by the alteration, provided the loss be made up. By heightening the pursuer's mill-wheel ten inches, according to the defender's proposal, one plain consequence is, that the mill must oftener want water in the summer time than it does at present. But perhaps this would not be ten shillings a-year out of the pursuer's pocket; and the defender, doubtless, to come at his purpose, will offer caution to make up this damage, were it twice as great. At this rate, though the pursuer's mill should be rendered entirely useless, it is still but a damage which the defender can also make up; and so the doctrine lands here, that for my neighbour's benefit, law will oblige me to abandon my property, provided he be willing to give an adequate price for the same. And, was this once an established doctrine, a thousand claims would be made, and a thousand consequences follow, which hitherto have not been thought to have any support from law.

" Found, that the defender cannot, without consent of the pursuer, build a dam-dike across the river of *Irvine*, so as to
 " cause the water restagnate upon the way-gang of the pursuer's mill, and thereby prejudice or hurt the going of the
 " mill as formerly; that the pursuer is not obliged to alter or
 " suffer any alteration to be made on the form of his mill, or
 " change the position of his mill-wheel, in order to avoid the
 " prejudice that may be occasioned by the restagnation of the
 " water; and that the defender has no right to insist on
 " making such alterations on the pursuer's property. Found
 " it proved, that, by the dam-dike lately erected, the water

“ does regorge and is thrown back upon the pursuer’s mill-wheel, to the hurt and prejudice of the going of the mill in the usual manner; and declared the same an encroachment upon the pursuer’s property, and decerned and ordained the said dam-dike to be removed or taken down, as far as it occasions a restagnation of the water in the common water-course, prejudicial to the pursuer’s mill.”

N^o LIII.

22d February 1744.

Sir ROBERT GORDON *contra* DUNBAR of Newtoun.

T E I N D S.

WHERE teinds of certain lands have been drawn *ipsa corpora* by the titular, and mixt so with teinds of other lands as not to admit a proof of the real quantity or annual value, the rule for ascertaining the value of these teinds, in a process of valuation at the instance of the heritors of the land, is, that the teinds be valued at the same rate as where a joint-duty is paid for stock and teind; that is, that they be valued at the fourth part of the rent paid to the pursuer for the stock; which comes to the same with the fifth part of the rent where that rent is paid both for stock and teind.

N^o LIV.

19th June 1744.

CREDITORS of Mr HUGH MURRAY *contra* ANDREW CHALMER.

C O M P E N S A T I O N.

HUGH MURRAY advocate, executor nominate by Sir James Rothead’s will, confirmed the moveables and executed the testament. In March 1741, being about to leave the town of Edinburgh, and apprehending a demand from Sir James Rothead’s next of kin of the balance in his hand, for which they had obtained a decree against him as Sir James’s executor, he lodged in the hand of Andrew Chalmer his clerk and ordinary doer, a sum to answer the said demand, and took from him a declaration in the following terms: “ I “ Andrew Chalmer writer in Edinburgh, grant that Mr Hugh Murray “ advocate, has given me in cash L. 135 Sterling, with which I am “ to pay the sum he is decerned to pay the nearest of kin of Sir “ James Rothead, and to report him their discharge.” The next of kin not having made a demand, the money remained with Chalmer till Mr Murray died insolvent, when his creditors attached the same by a confirmation as executors-creditors. Chalmer brought a multiple-

triple-poining, and claimed retention of this sum for relief of certain debts wherein he was cautioner for Mr *Murray*. The creditors opposed this demand, insisting, in terms of the statute, that compensation is confined to actions of debt, and does not take place in an *actio mandati*; that a person employed as a hand, is limited to act like a hand by delivering the subject as directed; and that *Chalmer* can no more with-hold Mr *Murray*'s cash from his creditors, than he could from Mr *Murray* himself. *Chalmer* on the other hand admitted, That being employed only as a hand, it became his duty to pay the sum to Sir *James Rothead*'s executors, or to redeliver the same to Mr *Murray* himself if demanded; and that in either of these cases he had no ground of compensation or retention. But he insisted, that the case was altered by Mr *Murray*'s death, which put an end to the mandate; after which he, *Chalmer*, could not lawfully pay the money to Sir *James*'s next of kin, which therefore remained in his hand as a proper debt due to Mr *Murray*'s representatives, subjected to compensation and retention.

The creditors acknowledged the mandate to be so far at an end by Mr *Murray*'s death, that *Chalmer* could not lawfully thereafter pay the money to Sir *James*'s next of kin; but insisted, that one branch of the mandate remained entire, which is, to redeliver the money to Mr *Murray*'s representatives. They put the case, that Mr *Murray*, finding use for the money, had changed his mind, and recalled the Commission: *Chalmer* must instantly have restored the money, and would not have been allowed to retain the same upon any ground whatever; and yet, by alteration of will, the mandate was as much at an end as it could be by Mr *Murray*'s death.

Chalmer answered, That there is a wide difference betwixt the putting an end to the mandate by Mr *Murray*'s death and by his alteration of will; that, during Mr *Murray*'s life, there were no *termini habiles* for compensation or retention, in respect that *Chalmer*, if he did not restore the money to his constituent, stood bound to pay it to Sir *James Rothead*'s next of kin; but that Mr *Murray*'s death having put an end to the latter branch of the obligation, nothing remained but a simple claim of restitution, which may be subjected to compensation or retention: and he added, that the same exception would have been competent against Mr *Murray* himself, had Sir *James*'s executors been *aliunde* satisfied of their claim against Mr *Murray*.

“ Found, That the contract betwixt Mr *Hugh Murray* and *Andrew Chalmer*, was a mandate which expired and became ineffectual
 “ by Mr *Murray*'s death; and that thereby *Andrew Chalmer* was
 “ in the common case of one having his debtor's money in his
 “ hand for which he is obliged to account; and that there-
 “ fore retention is competent to him until he be relieved of his
 “ cautionary-engagements.”

N^o LV.

20th July 1744.

LINDSAY, &c. *contra* ROBERT DRUMMOND.

PUBLIC OFFICER.

ROBERT DRUMMOND having got a commission from the Lord Lion to be a messenger for the shire of *Edinburgh*, a bill of suspension was offered by the messengers of *Edinburgh* upon two grounds: 1^{mo}, The bad character of the said *Robert Drummond*. 2^{dly}, By the act 46. parl. 11. Ja. VI. the number of messengers to serve within the shire of *Edinburgh* is limited to twenty-four, whereof the Lion and his brethren the heralds and pursuivants make seventeen; that the number is already compleated; and that there is a *jus quæsitum* to the messengers already admitted to bar the admission of a greater number. This bill of suspension being reported to the Court, it was unanimously refused as incompetent. The President reasoned, that Mr *Drummond* was *de facto* a messenger by the Lion's commission, and that it was not competent to turn him out of his office by such an application to the Court of Session without first applying to the Lion, against whose sentence there might be an appeal to the Court of Session, not otherways. *Elcbies* said, That if the Lion should name one to be a messenger who is infamous by a public sentence, or otherways rendered incapable, remeid might lie by a suspension; but was of opinion with the President in the present case. With regard to the number of messengers, the Court was of opinion, that the Lion, heralds, and pursuivants, are not to be counted upon to fill up the number of messengers for the county of *Edinburgh*.

N^o LVI.

2d November 1744.

JOHN LESLIE *contra* ROBERT CLEUCH.

DEATH-BED.

JAMES LESLIE of *New-grange*, in May 1737, being on death-bed, disposed certain subjects, worth about L. 60 Sterling yearly, to *Archibald Leslie* his eldest son, and the heirs of his body; which failing, to the children of his second son *John Leslie*, excluding *John* himself from the succession. And the disposition is burdened with L. 20 Sterling yearly, in name of jointure, to *Violet Johnston* spouse to the said *Archibald Leslie*. In March 1738, *Archibald Leslie*, being also on death-bed and having no hopes of issue, disposed the foresaid subjects to *James* and *Elisabeth Leslies*, children of his brother *John*, bearing, to be for fulfilling his father's disposition; and specially ratifying the said provision of L. 20 Sterling yearly in favour of *Violet*

Let Johnston his spouse. *John Leslie*, after his brother's death without issue, being now heir-apparent to his father, brought a reduction on the head of death-bed of his father's settlement, concluding particularly against the jointure provided to *Violet Johnston*. The defence was, that this settlement was ratified by *Archibald Leslie*, at that time heir-apparent.

Answered, This ratification was executed also on death-bed.

Replied, That a ratification granted by an heir-apparent, is not one of those deeds that can be challenged upon the head of death-bed: the rule of law is, that a man upon death-bed cannot alienate his estate in prejudice of his heir; but every deed done upon death-bed, whereby a third party happens to be deprived of an expected succession, is not reducible: a man dies, leaving a son and daughter of a first marriage, and a son of a second marriage; if the eldest son die in apparenacy, the second son will be heir to the estate, yet there is nothing in law to bar the eldest son from making up his titles, even upon death-bed, though by this step the second son will be excluded by the sister. In short, the law restrains proprietors from disinheriting their heirs upon death-bed; but bars not any rational deed, such as a ratification of a predecessor's settlement, though the consequence may be to set aside one who would otherwise succeed. *2do*, *Esso* a ratification were a deed of that nature to fall under the law of death-bed, yet one requisite is wanting to found this reduction, which is, that the pursuer must qualify himself to be the defunct's heir in that subject of which he is deprived by the defunct's deed: but the pursuer, though heir to his brother *Archibald*, who granted the deed challenged, is not heir to him in the subject with regard to which the deed is executed, but is heir to his father in that subject.

"The Lords assilzied from the reduction."

N^o LVII.

3d November 1744.

Lady HOUSTON *contra* Sir GEORGE DUNBAR and Sir WILLIAM NICOLSON.

HEIRS-PORCIONERS.

THE succession of the estate of *Carnock* having opened to three heirs-portioners, a process was brought for dividing the same among them. A small part of the lands had been feued, *viz.* *Gartencaber* and *Carbrock*, each possessed by a different vassal, and each paying the precise same sum of feu-duty; and the question was, in what manner these superiorities should be divided among the three heirs-portioners? For Lady *Houston* the eldest, it was contended, That all indivisible subjects, such as titles of honour, jurisdictions, the principal messuage, ward and blanch superiorities, belong to the eldest heir-portioner by the privilege of primogeniture:

Y

that

that a feu-superiority, being also an indivisible subject, comes under the same rule; and that, if such subjects belong to the eldest heir-portioner *jure proprio*, there can be no foundation for obliging her to pay any recompense to her sisters; because a man is not bound to pay a price for his own property.

It was answered for the other heirs-portioners, That, whatever be the rule as to subjects that are strictly indivisible, the same rule cannot obtain as to feu-duties which are divisible: that *Craig, lib. 2. dieg. 14. § 7.* is clear that the eldest heir-portioner who succeeds in a feu-superiority, is bound to pay a proportion of the value to the other heirs-portioners: that *Stair, tit. (Heirs) § 11.* delivers the same opinion; with this addition, that if there be any more feu-superiorities than one, they ought to be distributed among the heirs-portioners.

“ Found, That the eldest heir-portioner is intitled to one of the superiorities and the feu-duties arising therefrom, and that she is intitled to make her election. Found, That the 2d heir-portioner is intitled to the other superiority, and the feu-duties arising therefrom. And found, That the third heir-portioner is intitled to a recompense from the other two heirs-portioners, for her proportion of the feu-duties.

The case being of no great importance to the parties, was reported upon a short minute, where the point was but slightly handled. In examining whether this judgment be well founded, it will be proper to take under consideration the case of heirs-portioners in a vassalage, which may possibly afford some argument from analogy. It is a rule laid down by *Glanvil, lib. 7. cap. 3.* as well as in the *Reg. Maj. lib. 2. cap. 29.* that even in ward-holding the land is to be equally divided among the heirs-portioners of the vassal, notwithstanding that the superior is only intitled to the service of one military vassal for the land. But then the matter is thus adjusted: that the husband of the eldest heir-portioner is he only who is bound to do homage for the land: which of them is bound to perform service to the superior in war, or whether they must club for a soldier, is not said.

I think the same rule must obtain with regard to heirs-portioners who succeed to a superiority; for this good reason, that lands held by any man, though, with regard to vassals, it be considered as a superiority, yet, with regard to the holder's superior, it is considered as a vassalage. And what clears this point is the form of making up titles to the land, which is the same in superiority and in vassalage. A right of superiority is never mentioned as such in any charter or retour: the land is mentioned, and the expression is the same whether it be a superiority or a property. From this very consideration it is evident, that heirs-portioners have an equal right to the land *pro indiviso*, and must make up titles accordingly, whether the land belonged to their ancestors in property or in superiority. The eldest, by the tenor of the retour, has no better right than the youngest.

Dignities

Dignities, offices, and such like feudal holdings, which have no relation to land, stand upon a different footing. These are in their nature indivisible, and, as they can be held but by one person, the eldest comes first in view. Whether her sisters be intitled to any recompense is not a clear point; but what inclines me to think that they are not intitled, are the following considerations: By the law of *England*, originally the same with ours, the eldest daughter has no claim to a peerage by succession; it being the privilege of the Crown to bestow the peerage upon any one of the daughters. And if, in our practice, this privilege of the Crown have given way to the privilege of primogeniture, a claim for recompense, which was not known originally, would not readily arise upon the innovation; especially as dignities, offices, and others of the like nature, are not capable of an estimation in money.

With regard to ward, relief, marriage, non-entry, and all casualties that not only belong to the superiority of land, but admit of a regular estimation in money, there can be no reason why the younger sisters, who have an equal interest in the land, should be deprived of their proportion. And as to the principal messuage, though, as an indivisible subject, it goes to the eldest, yet, as a subject which can bear an estimation in money, it is settled that the younger sisters are intitled to a recompense; *Glanvil, lib. 7. cap. 3. Reg. Maj. lib. 2. cap. 27. § 4. cap. 28. § 3.*

It is very true, that as, on one hand, the superior is not intitled to homage and military-service from each of the heirs-portioners in the property, but only from the eldest, so, on the other hand, the vassal is not bound to do homage or perform military service to each of the heirs-portioners in the superiority, but only to the eldest: nor is the heir of the vassal bound to demand investiture from each of those heirs-portioners, but only from the eldest. But though the eldest is thus preferred to indivisible rights, without a recompense, where the subjects admit not a pecuniary estimation; it will not follow, that she must also be preferred, without a recompense, to pecuniary casualties, which not only admit an estimation, but which, in fact, can be divided among the heirs-portioners. Taking the matter in this light, the interlocutor is undoubtedly well founded. While the heirs-portioners in the superiority possess *pro indiviso*, there is the same reason for distributing the feu-duties among them, that there is for distributing the rents. And when they choose to bring a process of division, there is the same reason for parcelling out among them the feu-superiorities, that there is for parcelling out the property of lands. And if there be not so many superiorities as there are heirs-portioners, the privilege of age intitles the elder sisters to make a choice, upon giving a recompense to the others.

N^o LVIII.

23d November 1744.

MARION WILSON *contra* Children of WILLIAM PURDIE.

P R O O F.

ANDREW PURDIE, merchant in *Mossplat*, died *intestate*, leaving three children by his wife *Marion Wilson*, *William*, *Anna*, and *Jean*. *Anna* was married while her father was alive, and got a provision of 2000 merks in full of her bairns part of gear, whereby the relict and the other two children were intitled to the free effects, which wholly consisted in moveables. By a minute of agreement in *February 1732*, it appears that there was a meeting of all the parties concerned in the succession, where it was agreed by the intervention of friends and communers, that the daughter *Jean* should have 2000 merks, the same sum which her elder sister had got; that *Marion Wilson* the relict should have a liferent of L. 5 Sterling yearly, and a faculty to dispose 1000 merks of the subject by testament; and that the remainder of the effects should belong to *William* the son, and he be the sole intromitter. This minute of agreement was so far fulfilled, that *Jean Purdie* got 2000 merks at her marriage; and as *Marion Wilson* continued to carry on the business of a retailer in her husband's shop, her son *William*, who had set up as a merchant in *Glasgow*, sent her, from time to time, merchant goods to the extent of L. 5 Sterling yearly. Matters continued upon this footing till *March 1737*, when an assignment was executed by *Marion Wilson* in favour of her son *William Purdie*, of all she had right to by her husband's death, with power to him to intromit with the same, "provided that he by acceptance thereof, become bound to pay her the yearly sum of L. 5 Sterling during her life, at the terms therein mentioned." The deed proceeds upon the narrative of love and favour, and certain other onerous considerations; but makes no mention of the former agreement.

After *William Purdie's* death, *Marion Wilson* called his children as defenders in a reduction of this assignment, upon the head of fraud and circumvention, condescending upon the following fact, That the faculty to dispose of the 1000 merks, contained in the minute of agreement 1732, was agreed to be reserved to her, though by the artifice of her son, it was left out of the assignment. The fact was proved by the two instrumentary witnesses; and, at advising the proof, a doubt occurred, whether it was competent to prove the said fact by witnesses, when the effect of it was to cut down a formal deed?

It was urged for the defenders, that though every extraneous circumstance relevant to reduce a transaction may be proved by witnesses, to the effect of annulling a written document, because such proof impinges not upon the faith of the writ; yet that no circumstance

stance contradictory to any clause in the writ can be proved by witnesses, which would be giving more credit to oral evidence than to writing. The pursuer does not assert, that she was induced by fraud and circumvention to discharge her faculty : her alledgance is only, that she understood the faculty was reserved to her in the assignment, and that she subscribed it upon her son's faith that it was so reserved. Now, this allegation is in direct contradiction to the writ, which sets forth, that she conveyed to her son the whole interest she had in her deceased husband's moveables, reserving only an annuity of L. 5 Sterling for life.

Answered for the pursuer, That had the faculty been discharged by an express clause in the deed, it would not have been competent to prove by witnesses, that it was agreed upon to be reserved ; but an allegation that an article agreed upon was left out of the deed either by oversight or by artifice, is not contradicting any clause in the deed, and therefore may be proved by witnesses.

“ Found the reason of reduction of the assignment, granted by
“ the pursuer to *William Purdie* relevant and proved, and there-
“ fore reduced and decerned.”

N^o LIX.

4th December 1744.

Mrs ISABEL SOMMERVILL *contra* Creditors of Mr HUGH MURRAY.

N E A R E S T of K I N.

HUGH SOMMERVILL having died intestate, his estate real and personal descended to his two daughters, who, in *September 1739*, were confirmed executors *qua* nearest of kin, upon giving up a full inventory of all the moveable debts and effects that at the time were known to belong to their father.

In *March 1741*, an account due to the said *Hugh Sommervill* by the Marquis of *Annandale* was discovered, amounting to above L. 3000 Scots. *Hugh Murray*, husband to one of the daughters *Isabella*, died in *December 1741* ; and the foresaid balance was eiked to the testament in *June 1743*. This produced a dispute betwixt *Isabella* and her deceased husband's creditors. She claimed this balance in conjunction with her sister, as being a subject not vested in her person till after her husband's death, and therefore not conveyed to her husband *jure mariti*. His creditors, on the other hand, claimed her half of this balance, upon the following medium, That confirmation by a next of kin, being *aditio hæreditatis in mobilibus*, is an universal title to all the personal estate, however defective the inventory may be ; and therefore, that as by the said confirmation, the full right of the dead's part was vested in *Isabella* before her husband's decease, the same passed to him *jure mariti*, and consequently to his creditors by regular attachment.

This was a new point, which claimed a hearing in presence; and as the partial confirmation was found to be an universal title, it is unnecessary to embarrass the point, by stating the arguments *pro* and *con*. It will give more satisfaction to state the chain of reasoning which moved the Court to give the cause for the creditors.

For clearing the point in issue, it was necessary to trace the history of this branch of law.

Bacon's
discourse
of the laws
and go-
vernment
of Eng-
land, page
144.

New a-
bridge-
ment of
the law,
title, Ex-
ecutors,
p. 398.

In *England*, originally the goods of the intestate passed by a kind of descent to the children; afterward by a *Saxon* law, the wife had her part; and this continued a considerable time after the conquest, till the clergy getting more and more power, came at last to swallow up entirely the moveable estates of those who died intestate.

And so it came to be settled, that if a man died intestate, neither his wife, children, nor next of kin, had any right to a share of his estate; but the Ordinary was to distribute it according to his conscience, to pious uses; and sometimes the wife and children might be amongst the number of those whom he appointed to receive it: but, however, the law trusted him with the sole disposition.

The first statute that abridged the power of the Ordinary was, 13th *Edward I.* cap. 19. by which it is enacted, "That where a man dies intestate and in debt, and the goods come to the Ordinary to be disposed, he shall satisfy the debts so far as the goods extend, in such sort as the executors of such person should have done in case he had made a will."

The fore-
cited au-
thor.

By statute 21. *Hen. VIII.* cap. 5. "In case any person die intestate, or the executors refuse to prove the testament, the Ordinary shall grant administration to the widow or the next of kin, or to both, taking surety for true administration." This statute gave admission to the next of kin to the office, but without benefit further than what they could make by the good will of the Ordinary. In process of time this appeared to be hard, and it came solemnly to be resolved, That the Ordinary, after administration granted by him, cannot compel the administrator to make distribution. But at last the right of the next of kin was fully established by statute 22d and 23d, *Charles II.* c. 10; which enacts, That after payment of debts, funerals, and just expences of all sorts, the surplusage shall be distribute as follows: "One third to the wife of the intestate, the residue among his children, and such as legally represent them, if any of them be dead. If there be no children nor legal representatives of them, one moiety shall be allotted to the wife, the residue equally to the next of kin to the intestate in equal degree, and those who represent them; but no representation shall be admitted among collaterals after brothers and sisters children. And if there be no wife, all shall be distributed among the children, and if no child, among the next of kin to the intestate in equal degree, and their representatives."

The law of *Scotland*, with respect to the present matter, appears to have been originally the same with that of *England*. It is, indeed,
laid

laid down in the *Reg. Majest. lib. 2. c. 37*. That the wife and children are each of them intitled to a third share of the moveables, and that when a man makes his testament, he has no power of disposal but of the remaining third part, which therefore is called the dead's part; and the same appears also to have been the law of *England*, *Fleta, lib. 2. c. 57. § 10*. But however plausible the inference may be, yet it does not hold, that the Ordinary, in distributing the goods of one who died intestate, was limited in the same manner as the proprietor himself was in making his testament. In *England*, as above observed, though the wife and children had a legal claim against the deceased himself, which he could not disappoint, yet such was the authority and influence of the clergy, that the Ordinary was laid under no such restriction: in distributing the effects of an intestate, he was under no restraint but that of his own conscience; even creditors had no legal claim till it was given them by a statute. The case was the same in *Scotland*; for which we need no other authority than the statutes of King *William, c. 22*. subjecting the Ordinary to pay the defunct's debts to the extent of his moveables. If, before that time, the creditors had no legal claim, the wife, children, and next of kin, could have none. This defect, however, with regard to the wife and children, was not severely felt, as the Ordinary seldom ventured to defraud them of their legal share. In a provincial council of the *Scots* Clergy held *anno 1420*, recorded in *Wilkin's Concilia Mag. Brit. vol. 3. p. 397*, it is laid down as the established practice, That the goods of those who die intestate are divided into three shares, one to the wife, another to the children, and a third called the dead's part, which last paid to the Bishop a shilling of the pound in name of quot.

But, with regard to the dead's part, the Ordinary took more liberty. Every man had it in his power to dispose of this portion of his effects; but if he made no will, it was understood to be his intention, that the Ordinary should have the management and distribution: and it was not thought a hardship that the church should ingross this power, when it appeared to proceed from the will of the defunct. But cases occurring, of persons under age dying before they are capable of making a testament, which left their next of kin without remedy, this was thought a grievance; to remedy which, the Act 120. parl. 1540, was introduced. The preamble is, "Whereas, persons often dying young, who cannot make a testament, the executor named by the Ordinary, does, notwithstanding, intronit with the whole goods, and withdraws the same from the nearest of kin, who should have the same by law." Therefore enacted, "That where any person dies within age, who cannot make a testament, their next of kin shall have their goods, without prejudice to the Ordinary's claim of a quot." But it must be observed, that the remedy here given to the next of kin, is far from affording them a claim against the executor in all cases: the statute takes place only

only where the predecessor dies so young as not to be *testamenti capax*.

This commencement however was attended with further salutary regulations. One article of the instructions given to the commissaries 1563, is "that if one die intestate, or his executor nominate refuse to accept of the office, the commissaries must give the office to the nearest of kin, being willing to find caution." This is plainly copied from the above mentioned statute of *Hen. VIII.* which passed a few years before. But the regulation had a more extensive effect in *Scotland* than in *England*. In *England*, it required a statute to complete the right of the next of kin, and to support their natural claim against the encroachments of the clergy; but in *Scotland*, Episcopacy being abolished soon after the reformation, and the bishops upon the reformation having lost all civil jurisdiction, the next of kin obtaining possession by confirming the defunct's effects, held them for their own use, no person being intitled to claim the same: the bishop had lost his claim; and the commissaries never had any.

So far the right of the next of kin was established, when the predecessor died intestate. But where a testament was made, which was the more frequent case, they were left without remedy, unless provision was made for them in the testament. They had no right hitherto established in them, save the privilege of being preferred before others to the office of executry. But this privilege could not take place where an executor was named; nor was any action competent at common law, to oblige the executor nominate to account to them. It was understood to be the will of the deceased, that the distribution should be left to the discretion of the executor where the contrary is not express; just as formerly it was understood to be his will, to leave all to the discretion of the ordinary, where he died intestate. And thus it happened, that the very nomination intitled the executor to retain to himself the free moveables, even where he was not named universal legatee. This was remedied by act 14. parl. 1617, which gives to the next of kin the like action against the executor nominate to account for the effects, that was before competent against him at the instance of the wife and children.

Such were the steps taken by our forefathers to bring the succession of moveables nearer the law of nature. But the remedy was not complete: there still remained cases in which the next of kin had no claim. For instance, where a man died intestate, and his next of kin, being infants, or abroad, had no opportunity to confirm, no action lay at their instance against the procurator-fiscal, nor against any other confirmed executor-dative by the commissaries. 'Tis true, that upon the foundation of the above mentioned instructions 1563, the next of kin might reduce the nomination of the executor-dative, if they could excuse their absence, and show by what means they were prevented from demanding to be confirmed executors. But, at any rate, this remedy comes too late after the testa-

ment

ment is executed, and the goods distributed. This defect was supplied by *Oliver Cromwell*. For in the *orders for regulating the prices and proceedings in the sheriff and commissary courts, by the commissioners for administration of justice to the people in Scotland, dated 14th January 1654*, it is enacted, article 15th, "that whoever shall obtain themselves executors-dative confirmed to any defunct, shall be liable to the wife and nearest of kin for their respective portions of the free goods in testament, by an immediate ordinar action; without necessity to reduce the former testament, or to obtain themselves executors to the defunct." And that this regulation was able to support itself by its intrinsic equity, notwithstanding the defect of legal authority, is vouched by the preamble of the act of sederunt, 14th November 1679, premising as a thing incumbent upon all executors by virtue of their office, "that they should execute the testament of the defunct, by recovering his goods, and obtaining payment of the debts owing to him, for behoof and interest of the relict, children or nearest of kin, creditors, and legatars of the defunct."

Thus, as the law stands at present, the next of kin, where the predecessor dies intestate, are intitled to the office of executor, which enables them to retain the free effects after discharging all the claims upon the executry. If another person be named executor by the deceased, that person is accountable to the next of kin. If an executor-dative slip into the office by surprise or otherwise, a reduction of his nomination is competent to the next of kin, or, at their choice, a direct action against him to account. These are the privileges which are bestowed on the next of kin. At the same time the next of kin have to this day, no legal claim equivalent to what children have for their share. The legitim is a claim which operates against the predecessor himself, and can be made effectual against every intermeddler with his moveables, by a proper action to account. The next of kin have no other privilege than to succeed to the dead's part; and to make this succession effectual, there must be a confirmation. If the next of kin apply, they are intitled to the office; and if the office be already filled, they have an action for the dead's part against the executor. But if the person who is next of kin at the predecessor's death die before there is a confirmation, he can transmit nothing to his representatives: he cannot transmit his privilege of being preferred to the office, which, like the privilege of entering heir, is purely personal. If another executor be confirmed, the action which arises to him against that person to account for the dead's part, is transmissible to his representatives, or to his assignees; but if there be no executor, he cannot transmit to his representatives or assignees an action which did not exist in his own person.

From these premises it is clear, that without confirmation there is no right established in the next of kin that can be transmitted to representatives or assignees. And this leads to the question in dispute, whether a partial confirmation, or, more properly speaking, a confir-

mation with a partial inventory, is not sufficient to vest the next of kin so as to transmit their right to their representatives and assignees? It is admitted that confirmation upon a limited title, such as that of executor-creditor, cannot have an universal effect with respect to the next of kin. But an universal title, such as that of an executor nominate, of an executor-dative, or of an executor *qua* next of kin, may be justly held an *aditio hereditatis in mobilibus*. And the reason is, that such title empowers the executor to intromit with the whole moveables, whether contained in the inventory or not; with this single provision, which is no limitation upon the title, that the executor is bound to add to the inventory what further subjects he intromits with; partly with a view to make a charge against himself, and partly to secure payment of the quot.

It was observed, that if a partial inventory were to have no further effect, than to establish the next of kin existing at the time the dead's part of the subjects contained in the inventory, very heteroclite effects would follow. It has hitherto been understood, that all in the same degree are intitled to the whole dead's part: whereas if the next of kin at the time existing were intitled to nothing but what is contained in the inventory, the dead's part may be split among two or three sets of next of kin; which is a phenomenon that never was heard of in law.

“ Found the confirmation of *Sommervill's* two daughters, as executors *qua* next of kin to him, did so far establish their right
 “ to the whole dead's part of the executry, as to make the same
 “ transmit to their assignees, whether voluntary or legal; though
 “ some particulars of the said executry were not specially contained in the inventory of the confirmed testament.”

N^o LX.

7th December 1744.

Dame SIDNEY SINCLAIR *contra* Sir WILLIAM DALRYMPLE.

HERITABLE and MOVEABLE.

SIR *John Dalrymple*, after settling his moveable estate upon his spouse, died 24th of *May* 1743, having the land about his house of *Cranston* in his natural possession, most of it in grass, partly natural and partly sown. One field of seven acres was sown the year before his death, and the first crop was not cut when he died; of the other sown grass he had reaped several crops. Toward the end of the year 1742, he had sown a field with rape-feed; but that failing, his purpose probably was to plow the field in *June* 1743, and to sow it with turnip. But, the day after Sir *John's* death, it was tilled by his relict and sown with barley.

His heir, Sir *William*, took possession of the farm, as well as of the rest of the estate, and cut down the said barley-crop. In a count
 and

and reckoning betwixt him and Sir *John*'s relict, she claimed the value of the barley-crop, and of the artificial grass-crop, as being moveable and falling under her disposition. The heir endeavoured to support his right to the same as heritable subjects, by the following chain of reasoning : 1^{mo}, It is one of the privileges of the heir to continue his predecessor's possession : and when the possession of an estate is apprehended either by an heir or a purchaser, it is a rule of common sense as well as of law, that every thing that is *pars soli* must go with the land. 2^{do}, As this rule may appear to be hard and rigorous when applied to some special cases, it has been softened in the practice of *England* and of this country. A liferenter ought not to be discouraged from making profit to himself, by taking land into his natural possession, in order to cultivate the same ; yet he runs this seen danger, that, if he die when his corns are ripe, and ready for the sickle, his right dies with him ; the corns as *pars soli* go with the land to the proprietor. This hardship has probably at first been remedied by particular pactions, and afterward it has grown into universal practice, that the representatives of the liferenter should have the benefit of the liferenter's industry, so far as to be allowed to reap the corns growing at the liferenter's death. It is probable that this practice has first obtained betwixt liferenters and fiars, whose interests are commonly distinct, and where the hardship must have appeared great. It has afterward been extended by analogy for the benefit of younger children, who are but scantily provided by our law ; and now it is established, that they shall have the corns growing upon the land in their father's natural possession, though really and truly not a moveable subject. 3^{tio}, This right introduced in favour of the representatives of a liferenter, and of the executors of a proprietor, which, for the sake of utility, deviates from the principles of law, has never been extended further, either in our practice or in the practice of *England*, than to corns actually sown and growing at the time of the liferenter or proprietor's death. Nor could it well be extended further, if the rules of law be at all regarded. For, as the proprietor's right is at an end with his life, as well as that of the liferenter, no mortal can be intitled to throw seed into the ground, except in the right, or by allowance of the present proprietor : after his right commences, seed thrown into the ground makes the crop as much his, as where it is sown twenty years after the predecessor's death. 4^{to}, The exception has never been extended further than to industrial fruits, which are sown and reaped annually. With regard to plants which remain longer in the ground than a year, neither the industry nor the expence are so great as to preponderate the rule of the law and of common sense, that whatever is fixed to the land must go along with the land. And were the exception to be extended beyond annual plants, we should have no resting place ; it behoved to be extended to every thing growing upon the ground that is the effect of industry, at whatever time sown or planted ;

ed; and, at that rate, all planted trees would go to the executor, were they a hundred years old.

“ Found the defender *Sir William Dalrymple*, heir in the estate,
 “ hath right to the whole grafs and hay the year libelled, it not
 “ being alleged that any grafs seeds were sown that year. And
 “ found, that the pursuer has not right to any part of the bar-
 “ ley-crop sown by her after *Sir John Dalrymple*’s decease; but
 “ that the defender is liable to the pursuer for the expence of
 “ the labour and of the seed.”

Nº LXI.

12th December 1744.

Duke of ROXBURGH *contra* SCOTT of *Horflie-bill*.

TEINDS. CITATION.

IN the year 1635, the Minister of the united parishes of *Morbottle* and *Mow*, brought a process of modification against the titular and the heritors, concluding in the same libel a valuation of the teinds of the parish. With regard to this conclusion the libel runs thus, “ That though by the good and worthy courſe intended by his Majesty, the teinds through the ſeveral parishes of this kingdom “ were appointed to be valued, yet the teinds of the parishes of *Morbottle* and *Mow* were not valued, whereby his Majesty was prejudiced of his annuity, and the pursuer frustrate of the benefit of “ augmentation; for remeid whereof, necessary it is that the teinds “ should be valued.” Both articles of the process went on, a rental was given in by the minister, and fixed by a reference to the oaths of the heritors, who were held as confessed. The teinds were valued, and a separate decree of valuation was extracted; the decerniture of which is in the following words; “ and the said Lords decern “ and ordain the ſums of money and quantities of victual above specified, to stand, continue and endure, and to be repute and holden “ the just, true and constant yearly worth and avail of the teinds, “ parſonage, and vicarage of the lands particularly above written “ *communibus annis*, in all time coming.”

As to the land of *Mow*, the heritor was not cited, but only his mother the liferentrix. But the heritor acquiesced in the decree by making payment upon it.

In the 1744, a process of modification and locality was brought at the instance of the minister of the said united parishes against the heritors. For *Scott of Horflie-bill*, one of the heritors, it was pleaded, that the teinds of his land were already valued in the above mentioned decree, and no place for valuing them over again. It was answered for the minister, or rather for the Duke of *Roxburgh* the titular, that the said decree, in which the minister was the pursuer,

fuier, was intended for no other effect but to pave the way to a modification; and that a valuation at the instance of a minister, who has no further interest than to obtain a modification, can never have the effect to settle a perpetual value upon the teinds, to be a rule among all parties concerned. *2do*, That the said decree is null *quoad* the lands of *Mow*, now belonging to *Horfliehill*, because the proprietor was not called.

Replied to the first, Where the minister brings a proof of the value of the teinds in a parish, merely to obtain a modification, such a valuation can have no effect other than what is intended; but that the valuation 1635, was intended to be a proper decree of valuation, is clear both from the libel and decree. The only question then is, whether a proper process of valuation brought by the minister can have the effect that is intended by it? which question receives an easy solution from the act 19. parl. 1633, empowering, in effect, the minister to pursue a valuation; because he cannot have a modification till the valuation of the parish be first closed. In support of this argument, a condescence was produced from the records of several such processes at the instance of the minister.

Replied to the second, It is a mistake to put a valuation of teinds upon the foot of judicial proceedings: there are frequent examples of valuations at the instance of the Commissioners themselves, without any prosecutor; and though it was rational and equitable to call all parties concerned, the citation of parties was no necessary solemnity; the heritors who are not called, have access to complain of an unequal valuation; but it is absurd to maintain that a decree of valuation, at the instance of a minister, however fair and just, is no rule to an heritor; and that an heritor cannot even take the benefit of it, but must take the precise same steps over again in a new valuation at his own instance.

“ Sustained the decree of valuation, though the minister was the
 “ only prosecutor. And the said act 1633, was what principal-
 “ ly moved them to pronounce this judgment.”

Lord *Elchies* observed, that it was the design of the legislature to force valuations by all reasonable means; and to this end that this burden was laid upon ministers, under the certification, that they should not have otherwise access to a modification; and that the act 30. parl. 1641, shews this to have been the case, in which act the Commissioners are empowered to modify after closing the valuation, “ or at least exact diligence of the minister to that effect.”

N^o LXII.21st December 1744.Creditors of CRICHEN *contra* CHARLES M'DOUAL.

P A Y M E N T.

PATRICK M'DOUAL of *Crichen*, in *April* 1734, executed a testament in favour of *Charles* his son, appointing him sole executor and universal legatee, with the burden of his just and lawful debts. *Patrick M'Doual* died in *May* thereafter, in good circumstances, so far as appeared. The six months were allowed to elapse without diligence; after which, *Charles* the son confirmed executor-testamentary; and upon that title had an universal intromission. It afterward appearing that *Patrick* the father had died utterly insolvent, *Charles* who was bound cautioner with his father in many debts claimed credit for such of these debts as he had paid, some before confirmation, and some after. He also claimed preference for such of these debts as were yet standing out, and also for other debts which he had paid voluntarily, and taken assignments to the same before confirmation.

In support of his claim, it was pleaded, That the law is not so whimsical as to make it necessary, that an executor who has an universal title of intromission, should take a decree against himself, or assign his debt to a trustee in order to take a decree. It considers the general confirmation to be virtually a confirmation *qua* executor-creditor. Nor is any injustice thereby done to the creditors; seeing a bare citation within six months will bring them in *pari passu* with the executor confirmed. The authority of Lord *Stair* was also urged, *tit. Executry*, § 73. in these words: "The executry is likewise
" exhausted by debts due to the executor himself without any pro-
" cess, but merely by exception of compensation, though he be not
" confirmed executor *qua* creditor, but executor otherwise." And again, § 76. "For instructing exhausted, executors may found upon
" payment of the privileged debts at any time, upon the expence of
" confirmation, upon debts due to themselves before confirmation,
" but not upon debts assigned to them after confirmation."

In answer to this claim, the creditors reasoned thus. The powers of an executor are by no means so extensive as those of a tutor. A tutor as to administration has the full powers of a proprietor: he may pay the debts in what order he thinks proper: he may prefer one creditor before another, as the deceased himself might have done. An executor has no such powers; his business is to gather in the effects, and to convert the same into money; but he is not trusted with the distribution, which is the province of the commissars, whose factor or trustee the executor is. He cannot pay to any mortal, but by their warrant or decree: so far as he pays upon their
authority.

authority, it is a sufficient exoneration; but if he make voluntary payments without such authority, he pays at his peril; he will not be allowed credit for such payment, unless where the debt would in all events be preferable. His case is precisely similar to that of a factor upon a sequestrated estate, who can make payment to no creditor without a special warrant of the Court. And this is the solid foundation in law for the rule, that an executor cannot pay without a decree; not even excepting an executor-testamentary, who without decree cannot pay any debts but what are given up in the testament, and appointed to be paid by the executor.

If this doctrine be well founded, an executor cannot in his exoneration take credit for debts due to himself. The nomination of an executor, whether by the commissary or by the deceased, implies no privilege as to debts due to the executor: he cannot pay to himself more than to other creditors, without the authority of the judge-ordinary; and he must have a decree for his warrant in the one case, as well as in the other. Nor is there any difficulty of obtaining such a warrant, either by applying in his own name, or by assigning his debt to a trustee in order to sue for payment. And, if the law stood otherwise, it would be gross iniquity to give any creditor the office of executor; for it would be giving him a preference before all the other creditors, without the least colour of justice or equity. It could never certainly be intended to give the commissaries such an arbitrary power over the property of others. But what is still worse, it may often happen that the commissaries have it not in their power to remedy this evil. It is an established rule, that the next of kin claiming the office, must be preferred before the creditors: the commissaries are not at liberty even to conjoin a creditor with them. Here will be injustice established by law; for it is in other words giving a preference to a creditor who is the next of kin before all the other creditors; though in all other cases debts *inter conjunctas personas* lie under the strongest suspicion. But the most glaring absurdity of all will be in the case of an executor-testamentary. A man who knows his circumstances to be wrong, has no more ado, but to appoint his favourite creditor to be his executor. The other creditors have no means to remedy this injustice; they cannot crave to be conjoined with an executor-testamentary: he must enjoy the office alone, though the consequence be, that at one sweep he exhaust the inventory by the debts due to himself.

If such be the undeniable consequences of the executor's doctrine, his claim can have no foundation in the common law of *Scotland*; for it would be absurd to suppose the law of any civilized country so unjust. It is true, the act of sederunt 1662, puts it in the power of creditors to prevent this injustice. But then, if an executor had not this privilege originally, which is endeavoured to be made out above, he cannot have it at present; for it is not the intention of the said act to bestow such a privilege, but rather the contrary. At the

the same time, this act is but an imperfect remedy, since its benefit subsists for but six months; and when persons die in credit, this short time often elapses without any diligence.

At advising the cause, *Elchies* gave his opinion upon the authority of Sir *Thomas Hope*, that an executor may make payment to himself. But he distinguished betwixt debts due to the executor himself, and debts outstanding, where he is only cautioner: with regard to the latter, he admitted, that an executor can have no preference, because the debts are not paid. *Arniston* observed, that Lord *Stair* puts this matter upon the footing of compensation, which extends the privilege to a cautionary engagement.

“ Found, that the petitioner, being confirmed executor-testamentary to *Patrick McDoual* his father, was preferable before the
 “ other creditors of the said defunct, for payment of the debts
 “ wherein he stood cautioner, or otherwise bound for the said
 “ defunct; and likewise found, that the petitioner as executor
 “ foresaid, was preferable before the other creditors for the
 “ debts paid by him, and to which he obtained assignation before the date of his confirmation.”

What prevailed here over principles of law and equity, was an established opinion, founded on the authority of Lord *Stair*, and of some singular decisions, that an executor is intitled to plead compensation. The pernicious consequences, however, of this judgment may be prevented by diligence within the six months. And hereafter, it is supposed, no creditor will neglect the privilege given by the act of federunt.

Nº LXIII.

4th January 1745.

MINISTER of *Kilwinning* contra GLASGOW of *Nethermain*s.

G L E B E.

BY act 21. parl. 1663, it is enacted, “ That every minister, except such ministers of royal burrows who have no right to
 “ glebes, have grafs for one horse and two kyne, to be designed out
 “ of kirk-lands, and with relief, according to former acts of parliament. And if there be no kirk-lands lying near the minister’s
 “ manse, or if the kirk-lands be arable; in either of these cases, ordains the heritors to pay to the minister yearly, the sum of L. 20
 “ Scots, for the said grafs; the heritors always being relieved, according to the law standing, off other heritors of kirk-lands in the
 “ parish.” The parish of *Kilwinning* belonged in property to the Abbots of *Kilwinning*, and was by them totally feued out; whereby there came to be about 200 heritors in the parish, all feuars of kirk-

kirk-lands. The minister wanting grafs for a horfe and two cows, applied to the presbytery. *George Glasgow* had a fingle acre lying next the glebe, and becaufe that acre was in tillage, the burden of the L. 20 *Scots* was laid upon him; leaving him to feek relief in terms of the ftatute.

The matter was by fufpention brought before the Court of Seffion, who gave the following fenfe to the ftatute, That the whole heritors of the parifh are to be liable at the firft inftance for the L. 20; and that they are intitled to relief from the heritors of kirk-lands. And upon this footing,

“ They turned the decree into a libel, and found, that the L. 20
 “ muft be laid upon the haill heritors in the parifh, proportion-
 “ ally to their valuation.”

This interpretation of the ftatute cannot well be fupported; for the context plainly fhows, that the heritors, who are to be liable at the firft inftance for the grafs-money, are the fame whole lands muft be allocated, if not arable. Befide that it is prepofterous to load the whole heritors at the firft inftance, and then to give them relief off the heritors of kirk-lands; when it would be eafier and more fimple to lay the burden directly upon the heritors of kirk-lands. But the truth is, that it was a blunder in the ftatute to provide relief where money was to be paid, in place of laying the grafs-money directly upon the whole heritors of kirk-lands; who, at any rate, are made liable ultimately. And it is probable the Court will follow this plan, by which the blunder will be corrected. And, with refpect to the prefent judgment, though it was the opinion of moft of the Judges, that the whole heritors muft be liable at the firft inftance with relief, &c. yet the interlocutor, in effect, goes no further than to burden the whole heritors of kirk-lands; the whole lands of this parifh being kirk-lands.

N^o LXIV.

24th January 1745.

Next of Kin of *Robert Carmichael* contra Next of Kin of *James Carmichael*.

N E A R E S T of K I N.

I N May 1743, *James Carmichael* commiffary clerk of *Lanerk* died without iffue and intefate, whereby the fucceffion to his moveables opened in favour of *Robert Carmichael* his brother, refiding in *Ireland*. *Robert* ufed all diligence to make up his titles, which was done by a commiffion from him. A decree-dative was obtained 5th *September*, an inventory given up, caution found, and, upon the 20th *September* 1743, the teftament was confirmed. But notice having come from *Ireland*, that *Robert* had died upon the 15th *September*, the other next of kin of the defunct apprehending that all the fteps

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taken for behoof of *Robert* were of no avail, by his predeceasing the confirmation, made application for the office. This was opposed by *Robert's* representatives, for whom it was pleaded, That though the office was not established in *Robert*, who died before confirmation; yet that the dead's part was fully established in him by the decree-dative, so as to transmit to his representatives, who, after being confirmed as next of kin to him, are intitled to be preferred as executors to the first defunct, since the whole benefit of the office accrues to them. The commissary having sustained the edict at the instance of the next of kin of *James* the first defunct, the cause was advocated; and the Lords, upon the principles set forth in a former decision, to wit, that the interest of the next of kin is only a succession, and that they have no right established in them capable to be transmitted to representatives, till one person or another be confirmed executor, pronounced the following interlocutor:

“ The Lords repell the reason of advocation, in respect of the answer, and remit the cause, with this instruction, that the commissary confirm the next of kin now existing of the said *James Carmichael*, and that without regard to the decree-dative in favour of the deceased *Robert Carmichael*.”

N^o LXV.

5th June 1745.

OVERSEERS of the Poor in the Parish of *Dunse*, contra The HERITORS of the Parish of *Edrom*.

V A G R A N T.

IT not being clear by acts of parliament, whether a three or a seven years residence intitles a poor person to the charity of the parish; the matter was brought before the Court, by a suspension of a decree of the justices of peace, in order to have a rule fixed.

“ Found, that the parish in which persons indigent or becoming indigent have resided, during the immediate three years preceding their application for charity, is bound to subsist and aliment such indigent and poor persons.”

N^o LXVI.

8th June 1745.

CREDITORS of *Glendinning* contra MONTGOMERY of *Magbiehill*.

C O M P E N S A T I O N and R E T E N T I O N.

MONTGOMERY of *Magbiehill*, factor for the Earl of *March*, took a bill from *Robert Glendinning* one of the tenants, for his arrears, being L. 1265 *Scots*. A few days before elapsing of the six months,
Magbiehill

Magbiebill sent this bill to a notary to be protested. A regular protest was returned, upon which a poinding ensued of *Glendinning's* flock of sheep. *Glendinning* becoming insolvent, his creditors arrested in *Magbiebill's* hands, pursued a furthcoming, and repeated a reduction of the poinding; upon this ground, that, notwithstanding the instrument of protest, there was no protest taken, but that the instrument was made up in the notary's dwelling-house, without taking any of these steps which are necessary in protesting a bill. And accordingly it came out upon proof, by the depositions of the witnesses insert in the instrument of protest, that none of the solemnities were used that are mentioned in the instrument.

The question was, what should be the effect of this null protest? *Magbiebill* insisted, that as he was *in optima fide* to poind by virtue of a protest, which he had reason to believe unexceptionable, he was not bound to restore the goods to the common debtor, without getting payment of the debt; and as little to the arresting creditors. The question being reported to the Court, *Elcbies* observed, that if the execution be informal, as proceeding upon a bill not duly protested, or rather not at all protested, the poinding cannot have the effect to transfer the property; *ergo*, the sheep, as *Glendinning's* property, are regularly attached by the arrestment laid in *Magbiebill's* hands; which being followed by a decree of furthcoming, must transfer the property from the common debtor to the arresters; whereby there is no place for pleading compensation or retention. *Arniston* gave his opinion, that arrestment being only a prohibitory execution, and not making a *nexus realis*, *Magbiebill* may lawfully retain the goods, which had thus come innocently into his possession, until he get payment of the debt upon which the poinding proceeded; and that he has this equitable privilege of retention against arresting creditors, as well as against the common debtor. He observed, that the difficulty would be greater, had the creditors attempted to poind the sheep in *Magbiebill's* possession. *Drummore* said, that it is not unusual to give retention, even where the intromission proceeds upon the authority of an informal execution; witness an adjudication, which though often annulled in a competition with other creditors, yet has always been sustained to save from repetition of sums or subjects intromitted with in virtue of it; so much weight is laid upon the *bona fides* of the intromitter.

“ The Lords sustained the defence, that *Magbiebill*, as creditor to
 “ *Glendinning*, having *bona fide* poinded his debtor's sheep, is not
 “ bound to restore the sheep, or to hold count for the price or
 “ value of them, 'till payment be made of the debts on which
 “ the execution proceeded.

This judgment is solidly founded on the nature of an arrestment, which can have no other effect than to oblige the arrestee to pay or to deliver to the arrester, what he was bound to pay or deliver to the common debtor. Now, *Magbiebill* having got into his possession
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the goods of the common debtor, though by an informal execution, even *Elchies* yielded, that in equity he was not bound to restore the same to the common debtor, without getting payment of his debt. If so, the arrestment could not bind him to restore these goods to the creditors, but in the same terms; as an arrestment can have no further effect than to transfer the obligation from the common debtor to the creditor; and by no means to afford a stronger claim to the arrester, than to the common debtor. And as compensation is good against an arrester, retention ought equally to be sustained where the common debtor is bankrupt; it being an established point in equity, That though compensation cannot be proponed after decree, it may be proponed by way of retention, where the party has no other chance of obtaining payment.

N^o LXVII.

21st June 1745.

CURRIE *contra* CRAWFURD.

H Y P O T H E C.

A Tenant's cattle being carried off by a poinding executed in June, the master having no other security for the arrears of the former year's rent, did *via facti* follow the poinder, and bring back the goods without losing a moment. In a process of spuilzie against him at the instance of the poinder, his defence was, that the hypothec upon cattle for the arrears of the former year's rent was still subsisting, and that detention is not only implied in the nature of the hypothec, but also a power of bringing back the goods *de recenti*; otherwise a hypothec upon a tenant's corns and cattle would avail little. And the decision, *Crichton contra* Earl of Queensberry, 11th December 1672, was appealed to, where a landlord was justified for bringing back his tenant's goods *via facti*, which under cloud of night were carried off by the tenant himself. The Lords were all of opinion that the decision, *Crichton contra* the Earl of Queensberry, is right. But the doubt was, whether in any case whatever, goods carried off by a poinding can be seized *via facti*. The case was put of a poinding for any common debt, where goods that belong not to the debtor happen by mistake to be poinded; yet that even in this case the proprietor cannot *via facti* seize upon his goods, but must claim by a process. This consideration determined the Lords to repel the defence.

A poinding is of the nature of a decree; it is a sentence of a competent judge, adjudging and decerning the goods to belong to the creditor, and this decree cannot be taken out of the way otherwise than by a proper reduction. This consideration lays open a remarkable difference betwixt a title acquired by private consent, and a title acquired by authority of a judge. If my goods are stole, I
can

can take them back *via facti*, even from a *bona fide* purchaser; but if the goods be poinded, supposing it even from the thief himself, there are no means of coming at the goods but by a process.

N^o LXVIII.

26th June 1745.

CREDITORS OF *Auchinbreck contra CAMPBELL of Ballerno.*

RIGHT in SECURITY.

IN the month of March 1710, Sir James Campbell of Auchinbreck granted an heritable bond over his whole estate to Ronald Campbell, writer to the Signet, for the sum of L. 7000 Scots; upon which the creditor was infeft in September 1710, and the sasine duly recorded. Upon the 24th of May 1711, Sir James having paid the arrears of interest, and 4000 merks of the principal sum, Ronald Campbell of that date granted a discharge and renunciation of the annualrent-right, to the extent of the sums received; and also granted a procuratory for resigning so far the annualrent-right in the hands of Sir James Campbell in *perpetuam remanentiam*. In the year 1727, a transaction was executed betwixt Sir James Campbell and Ronald Campbell's son, who was his heir and executor. After stating accounts, a balance was found due by Sir James of 5500 merks, beside the remainder of the heritable bond; and as the creditor wanted security, a method was proposed to save the expence of a new infeftment, which was thought equally effectual in law. The discharge and renunciation above mentioned was given back: Sir James subscribed a declaration, that the L. 7000 Scots was wholly resting by him, "notwithstanding of any writings preceding this date, which "may import the same or any part paid." And of the same date he granted a moveable bond to Mr Campbell for L. 1000 Scots, being the balance that remained due after what was necessary to redintegrate the heritable bond.

At this period Sir James was in good credit, and his estate clear of infeftments. But thereafter, having contracted great debts upon which infeftments followed, the creditors, in a ranking, opposed Mr Campbell's preference for the whole sums in his heritable bond, insisting that he could only be ranked for the balance, deducting the 4000 merks which was paid in May 1711, and which extinguished the infeftment *pro tanto*.

On the other hand, it was pleaded for Mr Campbell, that *unum quodque dissolvitur eodem modo quo colligatur*; that infeftments are not taken away by personal deeds; that there must either be a new infeftment, or a resignation *ad remanentiam*. There are but two exceptions from this rule, which require attention, as they give light to the argument. Since the act 16th parl. 1617, a renunciation recorded has ever been held effectual against a singular successor in

an infeftment of annualrent, though there be neither a procuratory nor instrument of resignation. The reason is, that the renunciation of a wadset is, when recorded, declared to be good against purchasers: and the argument proceeds *a pari* to the renunciation of an annualrent-right; for the purchaser who sees on record a renunciation of the right, cannot be in *bona fide*. This was found, *Stair*, 7th January 1680, *M'Lellan contra Musbet*; *Fountainball*, 2d January 1705, heirs of *Learmont contra Gordon*. A second exception is, that intromission by virtue of legal execution extinguishes the annualrent-right *pro tanto*, so as to be effectual against a purchaser; *Stair*, 8th July 1680, *Ranken contra Arnot*. And here is to be noticed a remarkable difference betwixt a voluntary payment, and a payment recovered out of the ground by virtue of legal execution. A debtor who makes voluntary payment, has it in his power to take a resignation *ad remanentiam*, and to see the same executed, or at least to record the renunciation; and *sibi imputet* if he neglect the forms required by law to make him secure. He has not the same opportunity when payment is recovered by pointing the ground; and yet it would be hard in this case, if he were not made secure. Here strict principles yield to utility, or rather necessity, as they ought to do in every case. For securing the debtor, the annualrent-right is extinguished by intromission upon pointing the ground, as much as by a resignation *ad remanentiam*, or by a registered renunciation.

From these premises it was urged, that the consent of parties vouched by a proper writing, was sufficient to restore the debt to its original sum; and as to the infeftment, that the same was never extinguished, either in whole or in part, which could only be done by an actual resignation *ad remanentiam*. The renunciation and procuratory of resignation not being upon record, would afford no defence against a purchaser from *Campbell*; which demonstrates, that the infeftment was not extinguished; for an infeftment extinguished in the person of an author, revives not in that of a singular successor: and, therefore, this objection cannot more avail the creditors, than it can avail Sir James himself; especially when these creditors lent their money after the infeftment was reintegrated.

“ The Lords repelled the objection, and preferred *Campbell* for his whole original sum.”

N^o LXIX.

7th July 1745.

CHARLES GRANT *contra* JOHN GRANT.

P A P I S T.

THE investitures of the estate of *Carron* being limited to heirs-male, and Colonel *Grant* of *Carron* having died without issue, *John Grant*, son to *Peter Grant* in *Dell*, was the nearest heir-male: but he being a professed Papist, and a fellow in the college of Jesuits at *St Omers*, a declarator was brought by *Charles Grant*, concluding that he the pursuer is the next Protestant heir, and that the said *John Grant* is a professed Papist, at least habite and repute such, and therefore incapable to succeed to the estate of *Carron*. After the libel was executed, the pursuer applied to the Court, setting furth, that the witnesses to prove his propinquity were very old men, and therefore craving an examination to lie *in retentis*. Answers were made by the heir of line, who had the Papist's authority to keep possession of the estate, that the *induciæ legales* not being run, no instructions were come from Mr *Grant* at *St Omers*, about the defence of the process. For this reason, the Lords refused the desire of the petition.

After the *induciæ* were run, and the process called, the pursuer insisted to have a proof of his propinquity before the Ordinary. Certain objections were made, which, with the answers, were reported to the Court. It was objected, *1mo*, That by the act 1700, it is incumbent upon the first Protestant heir, to prosecute his right within the space of two years after the irritancy is incurred, otherwise the right devolves upon the next Protestant heir, and that this action was not brought within two years after Colonel *Grant*'s decease. *2do*, That this method which the pursuer has taken to declare his right, as Protestant heir, is not competent, having no foundation in the act of Parliament 1700; the only method there prescribed being by service. *3tio*, That, as the act founded on is penal, irritating the defender's natural right to the estate of his predecessor, it allows him to purge himself of Popery in the manner therein directed: but so it happens from an alteration in our constitution, that it is impracticable for the defender, or any other in his circumstances, to comply with the act, so far as it directs that the *formula* shall be taken before the Privy-council, which is now abolished, or before the presbytery of the bounds where the party resides; and in that case, his renunciation of Popery is appointed to be reported by the presbytery to the clerk of the Privy-council within forty days; and, as this cannot be done, no action can be maintained on the statute, to forfeit a person for not doing what is not in his power.

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To the first it was answered, in point of fact, That there was no delay, as the pursuer's father set on foot his claim immediately after the Colonel's death, by a declarator of his propinquity, the prosecution of which was staid by his death. 2dly, In point of law, That the delay of two years gives access to the second Protestant heir to claim the succession, but is not an irritancy upon the first Protestant heir to bar him from prosecuting his claim, though the second Protestant heir do not appear.

To the second, That a service is necessary to complete the title of the Protestant heir; but that this excludes not a previous declarator to remove all objections to the service. If a Protestant be intitled to serve heir, by the incapacity of the Popish heir, he must be intitled to bring a declarator of his right upon the principles of common law.

It was answered to the third, That it proceeds upon a misapprehension of the statute; the sense of which is, that, if a succession open to a Papist after his age of 15, which is the present case, the right of succession shall devolve *ipso facto* to the next Protestant heir, who is allowed to serve heir to the predecessor, and to possess until the Popish heir thus excluded purge himself of Popery. The pursuer is therefore intitled to serve, and to bring a declarator to that effect. It is the Popish heir's business, if he would claim the estate, to purge himself of Popery in the terms prescribed by the statute; and, in the mean time, the pursuer is intitled to hold the estate until the Papist fulfil the law. And if alteration of circumstances, by the abolition of the Privy-council, should even have the effect to make it impracticable to purge himself of Popery, in the terms prescribed by the statute, this cannot affect the pursuer's right. At the same time, the difficulty is affected. If Mr *Grant* return to his native country, he may take the *formula* before any presbytery where he chooses to reside, which will purge his incapacity. It will not affect his right, that the same cannot now be reported to the Privy-council, more than the neglect of reporting when the Privy-council subsisted.

"The Lords, before answer, allowed a proof to be taken to lie *in retentis*, which was what the pursuer chiefly aimed at."

N^o LXX.

9th July 1745.

BLAIR *contra* BALFOUR of *Dunboig*.

P R O O F.

ROBERT BLAIR in *Errol*, being creditor to *George Paterfon* of *Dunmuir* by bond, for the sum of L. 3000 *Scots*, executed an arrestment in the hands of *Balfour* of *Dunboig*, who acknowledged he was resting a certain sum to the common debtor; but insisted upon several

veral articles of compensation, which he offered to prove by the common debtor's oath. The pursuer admitted, that in ordinary cases the common debtor's oath acknowledging a ground of compensation, is relevant against the arrester. But he observed, that the common debtor in this case was bankrupt, and that a bankrupt's oath is not good against his creditors. The Ordinary having admitted the common debtor's oath before answer, the pursuer reclaimed, insisting upon the following topic, that, when the common debtor diminishes the subject arrested, by acknowledging upon oath a payment made to him, or a ground of compensation against him, it is in effect deponing against himself, which makes such an oath the strongest of all evidence; for, if the arrester be not paid by the process of forthcoming, he must be paid *aliunde*. This is not the case of a bankrupt: he may be justly considered as an indifferent spectator not at all interested whether the arrester obtain payment or not: no compulsion lies upon him to speak truth, more than upon any indifferent witness. In support of the pleading, the decision *Nairn contra Drummond*, 23d November 1725, was urged, which is as follows. In a process of forthcoming of a debt constituted by bond, it was objected by the arrestee, that the bond was granted by him *spe numerandæ pecuniæ*, which he offered to prove by the common debtor's oath. "Found, that such an exception might be proved by the common debtor's oath after an arrestment; but in regard that in this case the arrestee had allowed the bonds to lie in the common debtor's hands for a long time; and that the common debtor was bankrupt, therefore found the exception could not be proved by the common debtor's oath."

When this petition was advised, *Elcbies* observed, that the cedent's oath is not good against an onerous assignee, because he is *funditus* denuded, and his oath is but that of a single witness; that, in the present case, the common debtor remains creditor after the arrestment as well as before, and that his oath is therefore an oath of party, not of a single witness. He said, that though the oath of a bankrupt ought to be less relied on, in a case of this nature, than that of a solvent person, yet *qua* party, his oath is still a relevant mean of proof, unless other circumstances concur to render his oath suspicious. He added, that the decision cited, *Nairn contra Drummond*, was a confirmation of this doctrine, where the Court did not sustain bankruptcy alone to bar the common debtor's oath, but conjoined it with a very suspicious circumstance which discredited the allegation; and it was for this reason that they refused to admit the allegation to be proved by the common debtor's oath.

In this case it was admitted, that the bankruptcy of the common debtor was not occasioned by any fault of his, and that he was a man of entire fame; and therefore the Lords were unanimous, that the articles of compensation might be proved by his oath; and so refused the bill without answers.

N^o LXXI.

10th July 1745.

ELIZABETH MIRRIE *contra* Sir ROBERT POLLOCK.

SOLIDUM ET PRO RATA.

THOMAS POLLOCK of *Balgray* having borrowed L. 1000 *Scots* from *Isabel Anderson*, granted bond to her for the same in *October* 1713: "And he as principal, and with him *Sir Robert Pollock* of that ilk as cautioner, sovrty, and full debtor, bound and obliged them conjunctly and severally, to repay the same." And the bond further contains an obligation upon the principal to relieve his cautioner. *Thomas Pollock* of *Balgray* having died, leaving his children under age, the said *Sir Robert Pollock*, and *James Pollock*, writer in *Edinburgh*, brother to the deceased, granted a bond of corroboration to the said *Isabel Anderson*, containing the following clause, "And seeing the foresaid sum of L. 1000 *Scots*, and the annualrents thereof from the 9th of *October* 1718, are resting owing, and that the said *Isabel Anderson* hath at our request and desire, and for our granting these presents, superseded payment of the foresaid sums to the term of payment under written; therefore wit ye us, in corroboration of the foresaid bond, to be bound and obliged conjunctly and severally to content and pay to the said *Isabel Anderson*, &c."

Elizabeth Mirrie, in the right of her husband *James Pollock*, brought a process against the representatives of the principal debtor, and against *Sir Robert Pollock* the co-cautioner, concluding against both a total relief. There was no compearance for the representatives of the principal debtor. But for *Sir Robert Pollock* the following defence was made, that *James Pollock* and the defender, by granting the bond of corroboration, became conjunct cautioners for the representatives of *Balgray*; that neither of them had a total relief against the other; and therefore that the pursuer, in the right of her husband *James Pollock*, can only have relief against the defender for the half.

Upon this defence the Lord *Drummore*, Ordinary, pronounced the following interlocutor: "Finds, that *Sir Robert Pollock*, by granting the bond of corroboration to *Isabel Anderson* of the original bond due to her, in which he was bound cautioner, sovrty, and full debtor, conjunctly and severally, became thereby principal debtor for the sums therein contained. And finds *James Pollock* the pursuer's husband can only be held to be cautioner for *Sir Robert*, in the bond of corroboration; and therefore that the pursuer, now in her husband's right, is intitled to a total relief against the defender *Sir Robert Pollock*."

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The substance of a reclaiming petition for Sir *Robert* is as follows:
1mo, Mutual relief among co-cautioners, unknown at common law without a clause in the bond agreeing to that mutual relief, is established without such a clause, on the most solid grounds both of justice and of expediency. Justice requires, that parties who are all equally subjected to one common burden, ought to bear that burden equally; and expediency requires, that a creditor should not be permitted to deal arbitrarily by relieving one cautioner at the expence of another. And these reasons both of them take place equally, whether the cautioners be bound in the same or in different bonds.
2do, Where a cautioner grants a bond of corroboration singly, the presumption is, that he interposes at the desire only of the principal debtor, unless the contrary be expressed. And *lastly*, where a cautioner in the original bond joins with a new cautioner in a bond of corroboration, without qualifying at whose desire or request, or for whose behoof, this bond of corroboration is granted, the presumption is, that the interposition is at the request of the principal debtor, or for his behoof. And the foundation of this presumption is, that, if either had a view to a total relief, he would not have failed to provide it to himself by a clause of relief, or at least to narrate the true *res gesta*, viz. that he interposed at the other's request.

"The Lords adhered to the Lord Ordinary's interlocutor."

The President urged this topic in favour of the interlocutor, that it is to be considered *cujus negotium geritur*. Here, *James Pollock* not being antecedently bound, and the principal debtor being dead, the presumption must lie, that *James Pollock* gave his credit to relieve Sir *Robert* from diligence. *Tinwald* said, that, by this argument, a new cautioner should have a total relief in every case against the cautioners in the original bond; for, by interposing his credit, which of course supercedes execution against all the obligants, it may be said, that *eorum negotium gessit*. *Elcbies* was violently against the judgment.

N^o LXXII.

18th July 1745.

The Creditors of Mr HUGH MURRAY *contra* His DAUGHTER.

B A N K R U P T.

IN the year 1730, *Hugh Dalrymple*, advocate, intermarried with *Isabella Sommervill*, second daughter to *Hugh Sommervill*, clerk to the Signet, without a marriage contract. In the year 1736, *Hugh Dalrymple* succeeded to the united estates of *Melgund* and *Kinninmont*, which by an entail, failing certain persons therein named, were settled upon

upon him and the heirs-male of his body ; which failing, the heirs-female of his body. In the year 1739, *Hugh Dalrymple*, now called *Hugh Murray*, being in an uncertain state of health, and having issue but one child a daughter, with little prospect of more children, a contract of marriage was executed, upon the narrative that Mr *Sommervill* had advanced to his son-in-law the sum of L. 1000 Sterling, and had then granted bond to him for another L. 1000, payable at his the granter's death. Further, Mr *Sommervill* becomes bound to pay to *Isabella Sommervill* his daughter in liferent, and to the children of the marriage one or more in fee, a third L. 1000 with interest after his death. On the other hand, Mr *Murray* became bound to invest his spouse in a liferent of L. 200 Sterling, payable out of his proper estate which was not entailed. 2dly, He became bound to resign his proper estate in favour of himself and the heirs-male of his body ; which failing, to the heirs-female of his body. 3tio, " In case there should be no sons existing at the dissolution of the marriage, but only daughters ; he became bound to pay to the daughter or daughters at marriage or majority, the sum of L. 2000, L. 2500, or L. 3000, as there should be one, two, or more daughters, existing at the dissolution of the marriage."

The marriage dissolved by Mr *Murray*'s predecease, leaving his said daughter, for he never had another child, to succeed to his whole fortune. But he having died *obraratus*, and his creditors having laid hold of his moveables and of his unentailed estate, a claim was made by his daughter for the above mentioned L. 2000, provided to her in case of no heirs-male of the marriage. And it being found by the Court that she was intitled to this sum, notwithstanding her having succeeded to the entailed estate, the creditors brought a reduction upon the act 1621, insisting that Mr *Murray* was insolvent at the date of the contract of marriage ; and that, to provide L. 2000 Sterling to a child who was to succeed to an opulent entailed estate, was a gratuitous deed, and therefore reducible upon the first clause of the statute. And the sum of the reasoning in support of this reduction, was as follows : 1mo, Though a man acts unjustly who does any deed to hurt his creditors, yet while he is under no legal impediment to manage his affairs, such as interdiction, inhibition, or no-tour bankruptcy, it must be lawful for third parties, who know nothing of his circumstances, to contract and deal with him. Thus, there is nothing to bar an insolvent person from borrowing money, buying or selling ; nay, there is nothing to bar him from lending his credit as cautioner, whatever risk he may run thereby, being a contract often necessary for carrying on what is commonly called business.

But, in the second place, law, which prescribes just bounds to the power of persons insolvent, does not countenance arbitrary or irrational deeds, which may prejudice creditors ; nor in such matters is it necessary to specify, that the deed is intended to prejudice creditors, and consequently fraudulent : every gratuitous or irrational deed

deed is fraudulent by construction of law, whether the wrong be intended or not, and is reducible upon the great rule of equity, *quod nemo debet locupletari aliena jactura*; and it can be noway hurtful to commerce to cut down such deeds.

3th, With regard to contracts of marriage, which lie in the middle betwixt these two extremes, every rational article suitable to the condition of the parties, (not to talk of their circumstances,) must be effectual, because an insolvent person is not barred from entering into a contract of marriage; and therefore, if the contract be rational and equal, considering the condition of the parties and their reputed circumstances, there is no law against such a contract. Lord *Stair* observes, "That competent provisions to wives or husbands are not accounted gratuitous but onerous, *ad sustinenda onera matrimonii*, and for other mutual provisions; but, if exorbitant, they will be liable in quantum locupletiores facti."

4th, This must hold more strongly in postnuptial contracts of marriage, where the mutual provisions ought to be strictly equal. In contracting a marriage, the parties are allowed to stand upon terms, and may refuse to proceed but upon certain conditions; which in a great measure must justify every article that is not glaringly irrational: but after the marriage there can be no such excuse for high provisions on either side; therefore every excess ought to be cut down as so far gratuitous, upon the principle, *quod nemo debet locupletari aliena jactura*.

5th, The Court has always used more liberty with provisions to the heirs or children of the marriage, than with the wife or husband's provision; and justly, for if such provisions were indulged, it would open a wide door to defraud creditors; considering that giving to an heir is but one step beyond preserving the fund for the insolvent person himself: neither is there here any real hardship upon the children, who are only deprived of what in equity and good conscience ought not to have been contracted in their favour. This point is established in our practice by many decisions.

To apply these observations: Here a contract of marriage is made at a time when Mr *Murray*, in an uncertain state of health, had little prospect of other issue than the daughter already procreated. In this condition, he provides no less than L.2000 Sterling to this daughter, which was to be made effectual to her even tho' she should succeed to the entailed estate; a most irrational provision to an heir, and unjustifiable, supposing Mr *Murray* at that time insolvent. For, if a son of the marriage was to rest contented with his right of succession, what good pretext could there be for giving an only daughter, who was to have the same benefit, an additional sum of L.2000 Sterling?

"Found, that the provision of L.2000 Sterling, contracted by
 " *Hugh Murray* in his contract of marriage to the only daughter
 " of the marriage, is reducible upon the act of Parliament 1621,
 " in case it shall appear that *Hugh Murray* was insolvent at the
 " date of the said contract."

N^o LXXIII.

19th July 1745.

JANET PATERSON *contra* AGNES SPREUL.

D E A T H - B E D.

JOHN PATERSON died of a decay *April* 1731, leaving issue two children, a daughter of a first marriage and a daughter of a second. Being upon death-bed he executed a settlement of his whole heritable and moveable estate, to his wife *Margaret Spreul* in liferent, and his two daughters equally in fee. And he further provides, in case of the decease of his youngest daughter before majority or marriage, that her mother should have an adjudication upon a certain estate named in the deed, at her own disposal.

The younger daughter having died soon after the father, the elder, who became heir in the whole, brought a reduction of her father's settlement, so far as concerned the alienation of the adjudication, being an heritable subject, in favour of the relict. The defence made for the relict was, that the deceased having settled upon his heirs all his moveables, of which he had the disposal even upon death-bed, the heir, who is a benefiter by this disposition, cannot quarrel the alienation of the heritable subject, which amounts not to the value of the moveables.

This defence, it was answered, resolves into a proposition which hitherto has not got the sanction of practice; to wit, that, to the extent of the moveables left to the heir, a man upon death-bed may alien any part of his heritage. This seems not consistent with the maxim, that the law denies liberty to dispose of heritage upon death-bed. Such a deed is null and void, and can infer no warrandice. If so, there is nothing to bar the pursuer from setting aside this deed altogether, so far as regards the heritable subjects, as being *ultra vires*, leaving it to subsist so far as the granter had power.

When this cause was advised, *Arniston* and *Elcbies* were absent. The President was clear, that the heir could not challenge the disposition, being *super tota materia* in her favour. He observed, that the law of death-bed was of old a salutary regulation when popery and superstition reigned in *Scotland*; but these having happily lost their influence, that it was rational rather to abridge than to extend this law, being contrary to the great law of nature, *uti quisque legasset de re sua, ita jus esto*. And it carried by a plurality to pronounce the following interlocutor:

“ Find, that there being moveable subjects, which the defunct was
 “ at liberty to have disposed of as he pleased, conveyed by the
 “ disposition to the heir, and that these moveables exceed in value the adjudication conveyed to the relict, the disposition is
 “ not in prejudice of the heir; and therefore, that she cannot
 “ challenge the same upon the head of death-bed.”

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This judgment might be right, had not the heir been also next of kin. But to bar a challenge of death-bed, it certainly would not be sufficient to say, that the heir being also next of kin is in possession of the moveable estate, as well as of that which is heritable. Now this, in effect, is the present case. It cannot be thought that the heirs were any way benefited by being disponees to the moveables, when they would have succeeded to the moveables though no disposition had been granted.

N^o LXXIV.

27th July 1745.

JAMES DUNBAR *contra* CREDITORS of *Grangebill*.

I N H I B I T I O N.

AALEXANDER DUNBAR proprietor of some houses in the town of *Forres*, and of some burrow-acres adjoining to the town, locally within the shire of *Elgin*, had no domicil but in the town: but being married to a daughter of *John Grant* in *Braehead* of *Botrifney* within the shire of *Banff*, he lived with his father-in-law, for some time after the marriage; and particularly, was living with him in the year 1726, when an inhibition was executed against him by *Henry Mill* one of his creditors. The inhibition was executed against himself personally at his father-in-law's dwelling-house, the 1st of *January*: upon the 2d, the lieges were inhibited at the mercat-cross of *Elgin*, head-burgh of the shire of *Elgin*, within which shire the debtor's estate lay; and upon the 24th, the letters of inhibition with the executions were recorded in the sheriff-court-books of the same shire. Soon after the date of this inhibition, *Alexander Dunbar* the debtor left the house of his father-in-law, and took up his residence at his own house within the said shire of *Elgin*; where he was living when he sold his estate to *Alexander Dunbar* of *Grangebill*, a gentleman of the same shire.

In a ranking and sale of the estate of *Grangebill*, preference was craved for the inhibiting debt upon the subjects purchased by *Grangebill*. It was objected, That the inhibition being executed against the debtor at his only residence at *Braehead* of *Botrifney* within the shire of *Banff*, ought to have been published at the head-burgh of the same shire. Answered *imo*, As the law regards only a constant known dwelling-house, and not an occasional residence, the inhibition was published properly at the mercat-cross of the shire where the debtor's only dwelling-house was. *2do*, Supposing publication in *Banff*-shire requisite to give the inhibition an effect against the whole lieges, the neglect of publishing it there will not justify an inhabitant of the shire of *Elgin* to purchase, *spreta auctoritate*.

It was admitted in the reply, that an inhibition recorded in one jurisdiction is not effectual as to land in another jurisdiction: but it was

was urged, that publication must necessarily be at the head burgh of the jurisdiction where the party dwells for the time ; that in no case is it regular to execute an inhibition personally at a debtor's dwelling-house within one jurisdiction, and against the lieges at the mercat-cross of another jurisdiction ; and therefore, that this inhibition is *funditus null* for want of due publication.

“ The Lords sustained the objection to the inhibition, that the
“ same was not published within the jurisdiction where the
“ debtor lived at the time of executing.”

N^o LXXV.

19th June 1746.

FREEHOLDERS of *Kincardine contra* THOMAS BURNET.

P A R L I A M E N T.

WILLIAM BURNET of *Criggie*, intending to qualify his son to be put upon the roll of freeholders in the county of *Kincardine*, disposed to him certain lands ; and the son expedite a charter under the great seal, and granted a charter to his father of the same lands, to be held of him for payment of a blench-duty of two pennies *Scots, si petatur tantum*. This qualification was called in question by a complaint laid upon the statute, at the instance of some of the freeholders of the shire. And the objection against it was, That it is manifestly collusive, and upon the statute *anno 7^{mo} Geo. II.* a nominal or fictitious estate, created in order to enable the young gentleman to vote for a member to serve in Parliament.

In answer to this objection, it was pleaded, That it is not relevant to say, that a man's title to an estate is created in order to procure a vote ; for such titles are created every day, where the principal view of the purchaser is in order to have a vote ; but, in terms of the statute, it must be a *nominal* or *fictitious* title created in order to a vote. Now, it is clearly expressed in the other clauses of the oath of trust, what a nominal or fictitious title is, *viz.* “ Where the person in the fee is under an obligation to redispone ; and consequently holds the estate depending on the will of another, or is under an obligation to make the rents and profits forthcoming to another ; and consequently does not hold the estate for his own use and benefit.” And to apply this to the present case, it may be true that Mr *Burnet's* estate affords him little rent or profit ; but then it is likewise true, that he enjoys all the rents and profits which arise out of that estate, and that he is not bound to account for these rents and profits to any one, nor stands under any obligation to reconvey the estate. So that it cannot be qualified in terms of the statute, that his title is nominal or fictitious ; though it may be true, that the principal or only intendment of the transaction was to intitle him to a vote.

“ The Lords first repelled, and afterwards sustained, the objection.”

N^o LXXVI.

N^o LXXVI.

2d July 1746.

Muir of *Caldwall* contra HERITORS of the Parish of *Dunlop*.

P R E S C R I P T I O N.

THE parish of *Dunlop* is one of the many parishes the teinds of which belonged to the abbacy of *Kilwinning*; and about the time of the Reformation, when the practice was to give long tacks of teinds in place of heritable rights, the commendator of *Kilwinning* set in tack to *Cunningham* of *Aiket* his heirs and assignees, the parsonage and vicarage teinds of the parish of *Dunlop*, for four lifetimes, and five times nineteen years. The abbacy of *Kilwinning* being afterward erected into a temporal lordship, in favour of the Earl of *Eglinton*, the Earl came to have right to the tack-duty of eight score merks yearly, stipulated to be paid by this tack; but the tack itself was a burden upon his grant, as all such grants of the patrimony of the church were made with the burden of prior rights.

In August 1655, *Hugh* Lord *Montgomery*, upon the narrative of having right by progress to a tack of the teinds of the whole lands belonging to the abbacy of *Kilwinning*, granted a sub-tack to *Muir* of *Caldwall* of the teinds of his own lands, locally within the parish of *Dunlop*. And the family of *Caldwall* have, past memory of man, possessed the teinds of their own lands without interruption, though *Cunningham* of *Aiket*, by his said tack, had a prior and preferable right to these teinds.

In a process of locality at the instance of the Minister of this parish against the heritors, it was insisted on for *Caldwall*, that however defective his title might be *a principio*, as flowing *a non habente potestatem*, yet that by the positive prescription his sub-tack was validated; and therefore, that with regard to the locality, he must be put upon the same footing with such other heritors of the parish as have sub-tacks from *Aiket* of the teinds of their own lands. This was opposed by the other heritors, who insisted that the positive prescription is a privilege confined to land-rights passing by infeftment, and that there are no words in the statute to support an extension of this privilege to tacks; that the matter therefore must be considered as it was at the date of *Caldwall*'s sub-tack, at which time the teinds of *Caldwall*'s lands belonged to *Aiket*, and consequently they are to be held as free teinds in *Aiket*'s hands, to be allocated *primo loco* to the minister.

“ Found, that the teinds of *Caldwall*'s lands are not to be held as
 “ free teinds in the hands of *Aiket*, but teinds to which *Cald-*
 “ *wall* has right by tack; and therefore, that they are to be
 “ burdened proportionally with the teinds to which the other
 “ heritors have right by sub-tacks from *Aiket*.”

It was the opinion of the Judges, that the positive prescription is a favourable plea; and though the statute mentions infeftments

only, yet that prescription has been introduced by practice to take place with regard to many other subjects, particularly with regard to tacks.

N° LXXVII.

2d July 1746.

Muir of *Caldwall* contra HERITORS of the parish of *Dunlop*.

T E I N D S.

IN a process of locality of the parish of *Dunlop*, the following question occurred. *Cunningham* of *Cherrylands* had feued out his lands in that parish, reserving the teinds. The other heritors insisted, that these must be considered as free teinds; because they belong to a person who is not proprietor of the lands out of which these teinds are payable. It was answered for *Cherrylands*, that *quoad* every mortal, save the feuars, he is proprietor, and consequently that these teinds must be considered as the teinds of his own lands. It is for this reason that the feuars cannot purchase these teinds, and it is for the same reason that they cannot be allocated to the minister, while there are any free teinds in the parish.

“ Found, that the teinds of the lands feued out by *Cherrylands*, are
 “ to be considered as if no such feus had been granted, and
 “ therefore that they cannot be allocated to the minister, while
 “ there are any free teinds in the parish.”

This point was much struggled. *Elchies* in particular was of opinion, that these teinds were to be considered as the teinds of other mens lands, in the hands of *Cherrylands*. And he put the case, What if a man should feu both stock and teind, and afterward purchase back the teind?

This seems in a good measure an arbitrary question. Though it may be said that the superior is the proprietor, and that the vassal's right is no more but a burden upon the superior's property, yet we are beginning to think that the vassal, who has commonly the substantial interest, is truly the proprietor. If a blench superior should purchase the teinds of the estate, I suspect they would be held to be teinds of another man's land: the same if they should be purchased by a feu superior, where the land is considerable, and the feu-duty small. But if a man feu his land at the full rent, which obliges the feuwar to live like a tenant, the teinds in the superior's hands will naturally be considered as the teinds of his own land; precisely as in the case of a long lease of land, perhaps ten or twelve years, which is equivalent or near equivalent to a feu-right.

The Lords were generally of opinion, that the statute 1693 does not determine this point in favour of the superior; because the statute supposes an implied paction, that the feuars shall not have liberty to purchase the teinds from the superior. And the observation

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is just; for, even supposing a paction betwixt the titular and any single proprietor, that the latter shall not have liberty to purchase the teinds of his own land from the former, this paction would not hinder the teind to be free teind to be allocated to the minister.

But with respect to the judgment in the present case, a doubt may arise, from considering that it is the genius of our law to give every man, as far as possible, the possession of his own teinds: that this is the foundation of the rule of allocating to the minister *primo loco* free teinds, or teinds in the possession of another than the heritor himself; for since the stipend must be paid out of the teinds, it is better that these be allocated, than teinds in the heritor's own hands. If this be the foundation of the rule, the consequence is, that teinds which cannot be purchased by the heritors, nor consolidated with the property, ought to be allocated to the minister *primo loco*, to save the teinds which are consolidated.

N^o LXXVIII.

13th January 1747.

ELLIOTS *contra* LITHGOW.

I N H I B I T I O N.

IN the ranking of the creditors of *Francis Armstrong*, there was produced for *John Lithgow* an infeftment of annualrent over the whole estate, being the first in time. Next in order were other infeftments of annualrent of different dates; some over one tenement, some over another. And these annualrent-rights did more than exhaust the value of the estate.

For the Earl of *Leven* was produced an inhibition executed against the common debtor, before any of the debts secured by the said infeftments were contracted. And, by the scheme of division, the debt due to the inhibitor was allocated proportionally upon the several annualrenters *pro rata* of the sums drawn by them out of the price of the estate, agreeably to the rule established in such cases.

But *Lithgow*, who was preferred upon his catholic infeftment, objecting that he ought to bear no burden of the inhibitor's debt, but that the same ought to be laid wholly upon the last infeftment, the objection was reported to the Lords, and the following is a summary of the arguments urged by the parties.

Lithgow's opponents, whose interest it was to support the scheme of division and the established practice of the Court, founded their argument upon the nature of an inhibition, which is a judicial prohibition discharging the debtor "to do any deed, whereby any part
 " of his lands, &c. may be apprised, adjudged, or evicted from him,
 " in prejudice of the complainer, and discharging the whole lieges
 " to accept any right from him of his lands, heritages, &c. or to
 " take from him any bonds, obligations or contracts, whereby any
 " part of the same may be apprised, adjudged, or any ways evicted
 " from

“ from the debtor.” This clause lays open the effect of an inhibition, which is only to set aside the deeds granted *lege prohibente*, in order that the inhibitor may have access to the debtor’s land, in the same manner as if such deeds had never existed. It is a prohibition merely personal against the debtor and the lieges, which may exclude, but cannot prefer. If an inhibitor has any preference, it must be upon other execution affecting the land, such as infestment, or adjudication, upon which he will be ranked in his order. But then as the effect of an inhibition is to remove and set aside deeds granted contrary to its prohibition, it reduces all such deeds, simply and absolutely without restriction. If the debtor alienate different parcels of his land to several parties, or give several infestments upon the same tenement to different creditors, all such deeds are equally liable to reduction at the inhibitor’s instance, the first as well as the last. It is no defence to the first creditor or purchaser, that he got right to a small part only of the debtor’s estate, and left a sufficiency for payment of the inhibitor. The letters expressly prohibit him to take right to any part of the debtor’s estate, or to accept any bond or contract, whereby any part of it may be adjudged or evicted. It will not even be a defence against this reduction, that the debtor is still sufficient and able to pay the debt. Sir Thomas Craig observes, that it was so determined in a process at the instance of the Countess of Crawford against the laird of Garthland, for reducing a right granted to him by her debtor, whom she had inhibited, lib. 1. dieg. 12. § 31. “ *Nam licet aliunde debitor erat idoneus facultatibus et solvendo; alienationem tamen in dictum dominum factam, rescindendam censuit senatus.*” And in fortification of this point, the uniform practice of the Court was appealed to, of reducing, without distinction, all deeds posterior to inhibition; in none of which was it ever sustained as a defence, that the common debtor, after the alienation, had a sufficient fund remaining for payment of the inhibitor.

This point was illustrated by comparing the effect of an inhibition with that of a consent given by one creditor to another’s preference. If two real creditors consent to a subsequent contraction, the creditor, to whom the consent is given, is preferable before both of them equally; and each of them, by virtue of the consent, must yield place to him equally.

The conclusion is, that an inhibitor is intitled to reduce and set aside equally every right granted posterior to his inhibition; and consequently to draw a share of the inhibiting debt from each of them *pro rata*.

On the other hand, to support the objection made by *Lithgow* against the scheme, it was urged, *imo*, That an inhibition is a ground of preference upon the land; that the inhibitor is intitled to be preferred *primo loco*, the first annual renter *secundo loco*, and after him the others in their order, which must make the loss to fall upon the last infestment.

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In answer to this, it was observed as above, That this argument is founded upon an obvious mistake ; because an inhibition gives no real preference upon the land, but is merely a personal prohibition, forbidding the debtor to alienate in prejudice of the inhibitor, and forbidding the lieges to contract with the debtor.

It was urged, in the *second* place, for *Litbgow*, That, by the style of inhibition, the debtor is discharged to contract or grant any deed whereby his land may be adjudged or evicted from him, in prejudice of the complainer ; that therefore the complainer can challenge the debtor's deeds no further than he sustains prejudice ; and he sustains no prejudice by the first deed, if the fund left be sufficient to pay him.

It was answered, That, in the strictest sense of the word, every alienation is prejudicial to the complainer, by lessening his security. And it is justly so understood in practice ; for otherwise it would occasion endless disputes about the extent and value of what is left, whether it be or be not sufficient to answer the inhibiting debt ; which would render an inhibition a troublesome and frequently a fruitless execution.

It was urged for *Litbgow*, in the *third* place, That the rule contended for by his parties would greatly prejudice the security of the records ; because no man could safely lend the smallest sum after inhibition, though he knew the debtor's estate was able to pay both his debt and the inhibitor's twenty times over. And it were absurd to suppose, that a creditor who had taken infestment upon an estate, which he saw liable to no incumbrance but an inhibition for a small sum, and thus had secured himself by all the forms of law, should be hurt by a posterior deed granted by his debtor.

It was answered, That, attending to the nature of an inhibition and its effect, every one must see it is impossible there can be any security to an after contractor, though he obtain infestment, unless he take care to see the inhibitor paid or secured. Suppose an inhibition is used against a debtor for no more than L. 1000, and his estate is worth L. 40,000 ; yet no man can safely lend another L. 1000 to the debtor upon an infestment ; for he cannot know but another infestment may be afterward taken of L. 39,000, upon a bond granted before the inhibition : And in that case the inhibitor will evict from the first annualrenter the L. 1000, for which he was ranked ; and this annualrenter can have no recourse against the second, but must lose his debt. Thus it appears, that no man that takes an infestment for the smallest sum, after an inhibition, can be certain that the fund he affects may not be the only fund out of which the inhibitor can draw his payment ; and, consequently, he is truly as guilty of the contempt of the law as any of the posterior contractors. He has taken a security *lege prohibente* ; and he must submit to the legal consequences of that prohibition. He sees it may subject him to have the whole security evicted from him without remedy ; and what reason has he to complain that he is subjected to the inhi-

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biter's debt equally with the other creditors who have contracted under the same prohibition? And it is a palpable mistake to say, that a creditor who lends upon an infeftment after inhibition, has secured himself by all the forms of law. For there are many methods obvious in law, whereby he could have obtained a security liable to no challenge. As, *first*, by advancing a little more money to clear the inhibitor; or by granting his bond, and taking infeftment for security of the whole sum, as well due to the inhibitor as advanced by himself; or by causing the debtor to grant infeftment to the inhibitor, and then he can be in no danger. Or, *thirdly*, by inhibiting the debtor upon his warrandice, which gives him recourse against other subjects belonging to the debtor. Or, *fourthly*, by taking infeftment of warrandice against the effect of the inhibition.

It was urged, in the *last* place, That the creditor last in order is *in mala fide* to lend his money, or take the real security, when he sees the lands exhausted by prior infeftments, and by the inhibition.

Answered, It often happens that the creditor who takes the first infeftment is more *in mala fide* than those who come after. The common case is, that a man, after inhibition, contracts personal debt, perhaps to no great extent: he continues in good credit; comes to be in labouring circumstances, and can procure no money but upon real security. He borrows a considerable sum, and the creditor obtains the first infeftment; after which the prior creditors, diffident of their security, obtain heritable bonds of corroboration, and are infeft. In the spirit of what is pleaded for *Lithgow*, the latest creditor who lent his money upon heritable security, when his debtor was in labouring circumstances, ought, as having the first infeftment, to bear no share of the burden of the inhibition; but the same ought to be totally laid upon the prior creditors, which is absurd.

“ Found, That the inhibition being prior to, and therefore affecting the annualrent-rights, the deficiency arising from the shortcoming of the fund, does not affect equally, or *pro rata*, all the annualrenters, who stand preferred one before the other; but “ must affect the least preferable.”

Through the weight of this decision, though deviating from the nature of an inhibition, the same judgment was given in the ranking of the creditors of *Langton*, 8th January 1760.

N^o LXXIX.

23d January 1747.

Earl of ROSEBERRY and his Creditors *contra* Ladies MARGARET and DOROTHEA PRIMROSES.

A N N U A L R E N T.

THE late Earl of *Roseberry* having five children, the eldest of whom, the present Earl, being to succeed to the entailed estate, settled upon his other children, *September* 1723, his whole funds real and personal, the entailed estate excepted. Having died within the sixty days, the deed was reckoned unavailable as to the real estate; and, as to the moveables, two of the children being of full age, made a transaction with their eldest brother, the present Earl, surrendering to him their interest in the said deed for a sum certain. The same transaction was afterward made with the other two children; upon which the present Earl obtained a confirmation as executor-dative to his father, and proceeded to intromit. The confirmation is dated in the year 1724; and, in the 1725, a reduction was brought of the transaction by the two youngest of the children, as to their interest in the moveables; and, upon evidence brought of some indirect practices by the Earl in bringing about the transaction, joined with the minority of the pursuers, the transaction was set aside as to them. This produced a count and reckoning, which subsisted many years, betwixt them and their brother the Earl, about his management as executor-dative. All the other points being settled, it came to be a question, Whether the Earl was liable for interest upon the ascertained balance? The Lord *Elchies*, Ordinary, pronounced the following interlocutor: “ Finds, That such sums as did bear annual-rents to the late Earl of *Roseberry*, and have been uplifted by the present Earl, ought, in the accounting betwixt the parties, to continue to bear annualrent; and, in like manner, that the profits of equivalent debentures, or other public funds, disposed of, or intromitted with by the present Earl, ought (as well as these funds themselves) to continue to be charged against him, unless it appear that there was a necessity to uplift and apply such sums bearing annualrent, or funds, for payment of pressing debts of the late Earl, and when he had no other sums of the executry in his hand. But finds that he is not chargeable with annualrent for what part of the executry did not bear annualrent or profit to the late Earl.” But afterward, having taken the case to report, the reasoning that determined the Court was to the following purpose.

As there is no proper succession of moveables like what there is in heritage, a trustee or administrator is appointed, to ingather the moveable effects of the deceased, to turn all into money, and to make distribution among the parties concerned. This management

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is implied in the very nature of the office, and is expressed in the commission granted by the Commissaries: "With full power to the said executor to intromit with the goods, gear, debts and sums of money contained in the above inventory, uplift, receive, and dispose upon the same, grant discharges thereof, and, if need be, to pursue therefor, &c. provided always that he render just count and reckoning of his intromissions, where and when the same shall be legally required." This commission binds the executor to execute the testament, by taking decrees against the debtors, and by proceeding to execution in order to force payment. Hence it is, that, if an executor die before the money be levied, the testament is reckoned so far not executed, and there is place for a new executor *ad non executum*. Upon the same plan of administration it is *tritissimi juris*, that an executor is not intitled by his commission to lend out the executry-funds upon interest: if he does, it is at his own peril; for his duty is not to lend out but to gather in, in order to make a distribution: he ought to have the money in his hand, ready at the call of the persons interested. And thus it was found July 1730, Creditors of *Thomson contra Monro*, that an executor-creditor, having lent out money upon interest, was liable to account to the other creditors for the neat balance only, not for the profits; because an executor is not bound, like a tutor, to lay out upon interest the sums he uplifts; and, if he does, the risk is his own.

From these premises it follows necessarily, that an executor is not liable for interest. If, on the one hand, he is bound to uplift, and, on the other, cannot lend out, there can be no place for this demand; nor can there be any difference betwixt sums bearing interest and not bearing interest as to this particular. Executors have oftener than once been found liable for allowing the funds to lie out upon interest; a decree is not reckoned sufficient execution; and consequently, if the debtor prove insolvent, the executor must make good the debt.

Inspecting the records of the Commissary-court, and the decrees of exoneration there found without number, in no case was interest ever decerned or so much as demanded. This shews the universal sense of the nation as to this point.

"Found the Earl of *Roseberry* the executor, not liable for the interest of the sums uplifted by him."

N. B. The pursuers reclaimed, giving up in a good measure the general point; but insisting upon several articles of malversation committed by the Earl in the execution of his office; upon which ground they said, interest ought to be due *nomine damni*. Answers having been given in, interest was found due from a certain period *retro*. This judgment was founded upon the special circumstances of the case, without intention to alter the foregoing interlocutor pronounced upon the abstract point.

Inspecting

Inspecting the law of *England*, I observe it to be a rule there as with us, that an executor is not liable for interest. But of late years the Court of Chancery has begun to find interest due. The reason given is, that the objection of the executor's running the risk of the money he lends out, vanishes where a man may insure his money for one *per cent.* See *General abridgement of cases in equity*, p. 238. § 23.

This argument was not moved for the pursuers; and it is uncertain what influence it might have had. As the intercourse betwixt the two parts of the united kingdom is daily opening more and more, it is probable that we will follow the judgments of the Court of Chancery in this particular; for which there are two reasons, *1mo*, The opportunity of insuring in *Scotland* as well as in *England*. *2do*, Our respect to the judgments of the House of Lords; which, in an appeal, would probably be directed by the practice of the Court of Chancery.

N^o LXXX.

24th February 1747.

FINLAYS *contra* Executors of AGNES CALDER.

H U S B A N D and W I F E.

A Marriage being dissolved by the predecease of the wife, which intitled her executors to a third of the goods in communion, and the husband having died soon after, a question occurred between the husband's children of a former marriage and the executors of the wife, Whether her funeral expences must come off the whole head of the moveables in communion, or only off her own legal third? The decisions of the Court differing about this point, there was a necessity to recur to principles. The executors of the husband yielded, that, in the case of insolvency, humanity obliges a husband to bury his wife, and a wife to bury her husband. But the wife had here a fund of her own, viz. her legal third, sufficient to answer the expence of her funerals; and whether this fund ought to be so applied must depend on the following point, Whether the society betwixt husband and wife be dissolved by death, or whether it subsists till the interment of the person who dies first? Supposing the latter, the funeral expences of the predeceasing husband or wife must come off the whole head. But there does not appear from the nature of that society, nor from utility, any reason for prolonging this society beyond the time of other societies, which finish by death, unless the contrary be provided. Nor doth the law of *Scotland* prolong this society beyond life; for debts contracted by the husband between his wife's death and her funeral, do not affect the goods in communion, not even debts contracted for house-keeping. This reasoning is supported by the authority of the *Roman law*, l. 16. *de Relig.*
 "Æquissimum enim visum est veteribus, mulieres, quasi de patrimo-

“ niis suis, ita de dotibus, funerari.” And *l. 13. Cod. de Negot. gesti.*
 “ Quod in uxorem tuam ægram erogasti, non a socero repetere, sed
 “ affectioni tuæ debes expendere. In funus sane ejus, si quod eo no-
 “ mine quasi recepturus erogasti, patrem, ad quem dos rediit, jure
 “ convenis.” It was observed, That all nations, *France, Holland,*
Germany, &c. where the communion of goods takes place, follow the
 same rule without one dissonant voice; so that we shall be singular if
 the practice be established among us of making the funeral expences
 a burden upon the whole head. And, to conclude with a very con-
 siderable authority at home, *Dirleton* is of the same opinion, *voce Fu-*
neral Charges. “ If the funeral charges for burying the husband
 “ should affect the whole moveable estate, or the dead’s part? An-
 “ swer, It should affect the dead’s part, seeing it is not a debt con-
 “ tracted during the communion.”
 “ Found, That the wife’s funeral expences must be defrayed out
 “ of her own fund.”

N^o LXXXI.

5th July 1747.

BURGESSES of *Rutberglen contra* The MAGISTRATES.

E X E C U T I O N.

A Complaint against the magistrates of *Rutberglen* for an undue election being appointed to be served against them, the complainers, instead of extracting the complaint and the interlocutor, and delivering the extracts to a messenger to be executed against the magistrates, took the short-hand way of delivering to the messenger the principal complaint itself with the interlocutor subjoined. It was objected, That this form was irregular; because the records of Court ought never to be carried out of Court, and the only proper warrant for executing is an extract under the hand of the clerk of Court.

Elcbies observed, that commonly the King’s authority is interposed by letters under his signet, for citing persons to appear before the Court of Session, but that, in matters which require dispatch, it is customary for the Court to cite by their own authority, as in summar complaints, which are constantly served by authority of the Court, without the intervention of the King’s authority; the extracted complaint and warrant for citing being delivered to the messenger, without passing the signet.

As to the objection of delivering the record itself to the messenger as his warrant, he observed, that it was the custom of old for macers to cite all parties within two miles of *Edinburgh*, carrying with them the record itself as their warrant; and that he has seen in the journals of this Court an instance of an order directed against

a secretary of state, to enter his person in ward, within three hours, which must have been served upon the secretary by the authority of the interlocutor itself, as there was no time for extracting.

“ The Lords accordingly repelled the objection.”

Nº LXXXII.

10th July 1745.

SIR ALEXANDER COCKBURN *contra* CREDITORS of *Langtoun*.

PERSONAL and TRANSMISSIBLE.

THE office of principal Usher to the King was granted heritably to the predecessor of Sir *Alexander Cockburn* of *Langtoun*. What was the precise date of the original grant, does not with certainty appear; but there is in the records a grant by King *Robert II.* ratified in parliament, to *Alexander de Cockburn*, therein designed, “ *dilecto nostro armigero.*” This grant disposes to him the three baronies of *Bolton*, *Caridden*, and *Langtoun*, in free forestry and warren, with the burgh of barony; and then adds, “ *Itaque quod dictus Alexander, hæredes vel assignati sui intersit vel intersint tres sectas capitales, viz. Sectam itineris justiciarii tent. inter vicecomitatum de Berwick super Tuedam, sectam itineris justiciarii tent. apud Edinburgh, et parlamentum nostrum tent. apud Sconam: et quod dictus Alexander vel hæredes sint principales ostiarii nostri ad nostra parlamenta, generalia concilia, et festa, capiendo de nobis et successoribus nostris per dictum tempus, liberationem pro duobus armigeris, duobus arcutenentibus, cum gladiferis et equis pertinentibus eisdem.*” And the charter contains a *Reddendo* of a pair of gilded spurs of blanch farm, *pro omni alio onere*. From the 1647, downward, there is a connected progress of grants from the crown, of the said office, to Sir *Alexander*’s predecessors, and their heirs-male; with this variation, by charter under the great seal in the 1674, that there is a fee, or yearly pension, of L. 250 Sterling, annexed to the office, in place of the livery, or maintenance formerly given to principal Usher’s attendants, to his Esquires, Archers, Sword-Bearers, and his, and their horses and their grooms.

The creditors of *Langtoun*, who had adjudged the office, as well as the land-estate, having brought a ranking and sale of the estate, comprehending the said heritable office, and the fees thereof, Sir *Alexander*, apparent heir-male of the family, being advised that this office was a right annexed to the person, and not to the estate, and consequently not transmissible by voluntary conveyance, nor by legal diligence, brought a declarator to have it found and declared, “ that this office is not a patrimonial estate, capable to be aliened from the family, or to be affected by creditors; but that it must descend to the heirs of the family in their right of blood, and that the pursuer’s taking and holding this office cannot subject him to the debts of his predecessors.”

In

In support of these conclusions, the arguments urged for the pursuer were what follow. Property, no doubt, implies a power of disposal, whether the subject of the property be land, moveables, or an office. But, by the establishment of the feudal law, which comprehended offices as well as lands, the superior was understood proprietor, and the vassal had nothing but the *ususfructus*, or the use of the subject. The grant made to the vassal of the land was not understood an alienation of the property, but only a right to enjoy the fruits instead of wages, to enable him to perform the services contained in the grant. At first these grants were during pleasure; they were afterward continued for life; and at last extended to the grantee's male descendants. Accordingly, when a vassal died, his right of usufruct died with him; and his son had no other right to the land, but what depended upon the superior's obligation contained in the original feudal right to renew the grant in favour of the grantee's male descendants. This claim was competent to the heir, not as deriving any right from his ancestor, but as creditor to the superior. See 2d of Statutes, *Rob. I. cap. 6.* which directs the manner of laying this claim.

Among the *Romans*, where lands were allodial, an heir claimed the land in right of his ancestor; and there was necessarily an *aditio hæreditatis* to be a legal and public testimony of the heir's will to subject himself to all the ancestor's debts and engagements, which was a necessary consequence among them of an heir's taking up an ancestor's estate. An *aditio hæreditatis* was not necessary among us, nor is such a form known in our old law. With regard to moveables, if they were not conveyed by testament, the church had the management and distribution. And as to land, the heir might safely demand a renovation of the feu from the superior, without any form of *aditio*; because an heir, by this new grant, became only subjected to perform the feudal services to the superior, without being liable for any of his ancestor's debts. As he took nothing in the right of his ancestor, there was no foundation in law nor equity, to burden him with his ancestor's debts. After the *Roman* law was introduced into *Scotland*, the great regard paid to that law among the modern nations in Europe led us by degrees to vary the principles of our old law, so as to accommodate them, as much as possible, to this new adopted law. Thus a special service is commonly held to be the form of *aditio* in land-estates. But when we consider the thing attentively, we will find, that a special service is not at all of the nature of an *aditio hæreditatis*, to transmit the defunct's right into the person of his heir: the whole procedure of it shows, that it is intended for no other purpose, but to obtain a renewal of the feu from the superior, and to derive a right from him, not at all from the defunct.

By the feudal law, and by the practice of this country, an heir of ward-land is not intitled to demand a renovation of the feu from the superior, till he be of full age for performing the services for
which

which the land was granted to his family. By the common principles of law, a minor is intitled to take up his father's right, as well as a major is. Here a minor has no claim to the land, which proves that he derives no right from the predecessor. His claim lies against the superior, who, in the original covenant, gave the land to the vassal and his male descendants, upon condition of military service, and for maintaining them during their service. But it is implied in such a grant, that the superior is not bound to give his land to an heir who is not capable to bear arms; and therefore he is not bound to give the heir possession 'till he be of full age, when he is understood fit for war.

Thus a vassal, by the feudal law, is in reality but a *liferenter* or *usufructuarius*, as much after heirs were introduced into feus as before. The heir is called to be servant to the superior, and he gets his wages or fee from the superior, who assigns him the same portion of land that his father formerly had, for the same service. But, in this matter, he is to be considered as heir *designative* only. He derives no right from his father, if it be not birth and blood. After the father's death the land returns to the superior, who bestows it of new upon the son, according to his promise in the original grant.

To come close to the present point, when the feudal law came to be in vigour, grants of all kinds were formed upon the plan of it, not excepting grants of honour and of offices. The office-bearer was the vassal, and he held his office of the granter his superior, under the condition of performing the duties of his office, of whatever nature these were. Dignities originally were always granted along with land, or with jurisdiction; and even at present, where they are granted without relation to either, they imply a *reddendo* of being the King's counsellors, and of attending him in parliament.

It is no wonder then, that by the original constitution of feudal holdings, the subjects or privileges thereby held, were put altogether *extra commercium*. Many things concurred: there was a *delectus personarum*; there was a standing contract betwixt the superior and his vassal; a subject granted for services to be performed by that very vassal, which subject could not be taken from the vassal without the superior's consent, as being destined for a certain purpose; and lastly, there was properly no subject in the vassal which could be alienated, every vassal being properly a *usufructuarius*, and the heir deriving right not from his predecessor, but from the superior.

But in progress of time, when nations were civilized, and the arts of peace cultivated, military prowess was of less importance. Peace produced industry, and industry produced commerce: money came to be of general use, and, by the increase of money, land acquired a value which it had not originally. Vassals were willing to alien their land for money, and superiors were easily brought to consent upon getting a part of the price. Thus the commerce of land crept

in by degrees: and when a man purchased land for a full price, it was a natural consequence that he should have more power over it than if he had got it as a gratuity for military service. In process of time feus came to be considered as *patrimonial*, which originally were *beneficiary* only: they came to be granted without limitation, to the purchaser, and to his heirs whatever. In a word, they are now in *England* in every shape allodial; and equally so in this country, except as to the form of transmission.

To this day, traces of our old law so far remain, that land cannot be directly alienated without the superior's consent. But then there is a remedy provided against this restraint, by an adjudication. So soon as land came to be *patrimonial*, it was a natural consequence that it should be attachable for payment of the vassal's debt. This gave rise to appraisings and adjudications, which the superior is bound to complete, by granting a charter to the creditor. And, under the notion of debt, every sort of conveyance may be thus made effectual.

Land is the most natural subject of commerce; and a desirable purchase, as being the most permanent commodity of any that is designed for the use of man: and this natural aptitude for commerce, could not fail in time to get the better of the feudal law. But offices and dignities are of a quite contrary nature. It is in a great measure inconsistent with the policy of a well-governed country, that these should be *in commercio*. It is even a stretch to make them hereditary; of which our legislature was extremely sensible in the reign of *James II.* when the evil was in part remedied by forbidding heritable offices to be granted in time coming. It would be still a wider stretch, to make such rights saleable, and adjudgeable by creditors, which might well deserve to be repressed by law, had it ever crept into use. But whatever faint attempts have been made, every good man must be pleased to find that such a gross corruption has never gained an establishment among us; and every good man must heartily wish that it never may.

Thus the strict rules of the feudal law continue among us in their original force, so far as they concern offices and dignities. These cannot be alienated without consent of the superior. And though by statute the superior is bound to accept a creditor for his vassal, who adjudges land for payment of debt; yet adjudgers of offices and dignities have no such privilege. The statute takes place only in lands and other *patrimonial* subjects; and neither the spirit nor letter of the law can be stretched to comprehend offices and dignities, which are strictly *beneficiary*, not at all *patrimonial*.

It is very true that the office of heritable usher is not of the first magnitude: perhaps it does not require any particular skill or activity to perform the duty of the office. But then it is a grant from the Crown to a certain family, selected to serve as usher; and the King cannot have other ushers imposed upon him, but whom he has chosen. Every heir is intitled to the office as called to it personally

sonally by the grant, and not as deriving any right from his predecessor. At the same time, it cannot pass observation, that the defenders seem to give little attention to consequences, when they urge the meanness of the office as an argument in their favour. Were the judgment in this case to affect the pursuer only, it would not deserve any regard further than so far as justice is concerned. But it makes the present question of the utmost importance, that it is a leading case; for whatever judgment is here given, must be applicable to offices of the highest trust and importance as well as the lowest. If the office of usher be found adjudgeable, the Court cannot stop short, but must find the same as to all the hereditary offices in the kingdom, the greatest in power and dignity not excepted.

This train of reasoning may be reduced into a narrow compass. The nature of these offices preserve them from being *in commercio*: and, when we consider the manner of their establishment by feudal holding, it must be yielded there was a time when they were *extra commercium* as much as land was. Land is now *in commercio*, and it is good policy it should be so. The direct contrary obtains in dignities and offices; it would be a gross abuse to bring them into commerce. These things being yielded, and there is no disputing any of them, it remains upon the defenders to make out that this abuse, however gross, is sanctified by practice and custom. If they can bring full evidence of this, there is no help for it, they must gain their cause. But if they can only give a few instances where heritable sheriffships have been adjudged, and at best acquiesced in without challenge; not one single instance where the same upon challenge has got the countenance and authority of a court of law, such instances can only shew that the abuse is creeping in; which, instead of being a favourable circumstance for the defenders, ought to rouse the attention of the Public, and engage the Court of Session, by a judgment upon the point of right, to put an end at once to this encroachment upon law and good policy. What an appearance must it have to see the two-fold power of a magistrate and of a judge, put to sale in a market, under the title of a Sheriffship? A thing that would be remarked as uncouth even in the history of savages. And yet the consequence is evident; for if a sheriffship be found adjudgeable for debt, such a judgment must pave the way to bring it absolutely into commerce. In a country where offices are venal, it is no wonder that every thing else should be bought and sold. But the pursuer rests in the humble assurance, that the Court of Session will never give countenance to such a gross corruption.

As the defenders laid great weight upon the many instances produced by them of heritable offices passing by *retours*; concluding from thence that heritable offices are considered in our practice to be *patrimonial*, and consequently attachable for payment of debt, the pursuer endeavoured to remove the weight of these instances by observing, that there is no instance of a service where nothing was intended

intended to be taken up but an office or a dignity. The instance of *Charles* the II.'s serving heir to the Duke of *Lenox* in order to carry the heritable offices of High Admiral, and High Chamberlain, does not hold true in fact: the brieve was taken out to serve the King heir in the earldom of *Lenox*, and these offices went into the retour, as being annexed to the earldom and contained in the charter from whence a description of the lands was taken. And it must be obvious, that instances of retours of lands where offices and dignities are also engrossed, can be of no weight to prove that in our practice retours are necessary to connect the heir's title to an office or dignity, since the retour at any rate is necessary for the land. But, as this matter is of importance, the pursuer will consider it a little more at large.

There can be little doubt, that the renovation of the feu in the person of every heir, was requisite in dignities and offices as well as in land. What was the precise form of the renovation in these cases, is a little dark. Our lawyers are silent upon this head; probably because the thing has not often occurred: for originally offices and dignities were always annexed to land, and the renovation of the feu by infestment upon a retour, carried along the whole connected rights. In *England*, at this very day, we find traces of the renovation of the feu in dignities: the heir of a peer cannot take his seat in parliament at short hand, but must be introduced by two other peers in a form prescribed by custom; and probably there has been some such thing in *Scotland*. But however this be, one thing is extremely plain, that a service and retour can never be requisite for making up the heir's title in a dignity or office, unless where annexed to land. It is obvious that a service and retour is calculated for land only. The questions which are put to the inquest do all of them regard the land in which the predecessor died infest; and the verdict or answers made by the jury are adapted to the questions. At the same time, in giving the heir possession of his father's dignity or office, there was no necessity of an inquisition as in the case of land. The King, though he is not supposed to know the condition and circumstances of every one of his vassals, can scarce fail to be personally acquainted with every one of his nobles, and with every one of his office-bearers; and therefore, for ought appears, the heir was admitted in these cases, whatever was the form of the admission, without any preceding inquisition.

And this is the true reason and foundation of the rule, that service is not necessary in dignities and in offices. An heir-apparent of a peer may, without any solemnity, assume his predecessor's title, which of course gives him all the privileges belonging to it. The case is the same with regard to an office. And it would appear, that, if there has been any particular form in these cases of renewing the feu in the person of the heir, the same has wore out of practice, as the strict forms of the feudal law are universally wearing

ing out. And so with regard to dignities and offices, the case among us at present comes to be much upon the same footing with what has always been the law of *France*, lands not excepted, that *mortuus facit vivum*; which in plain *English* is, that the heir is intitled to take up his predecessor's right at short-hand, without needing a renovation of the feu from the superior.

The pursuer thought it necessary to explain this matter at large, both as tending to support one branch of his libel, *viz.* that he is intitled to take up the office of usher without a service, and consequently without being subjected to the debts of his predecessor; and also, as furnishing, in his apprehension, a strong additional argument in support of the first branch of his libel, *viz.* that the subject is not adjudgeable. For to say a subject may be taken up by an heir without incurring a passive title, and to say that a subject is not adjudgeable, are propositions intimately connected; the one must be a consequence of the other: the reason is, that a man can withhold from his creditors no subject which he can turn into money for their payment: every such subject may be attached by legal execution; and the heir, who takes up such a subject, must be liable in a passive title, as intromitting with a fund which ought to go to creditors for their payment. If, therefore, there be a subject which is not attachable by creditors, we may safely conclude that the heir may take up the same without incurring a passive title: as *e converso*, if there be a subject which the heir may take up without incurring a passive title, we may as safely conclude that the same is not attachable by creditors. This seems to be resting upon a secure foundation; let us apply. It is *tritiſſimi juris*, that an heir may take up his predecessor's peerage, without danger of incurring any passive title; *ergo*, a peerage is not adjudgeable. It was never dreamed that the taking up an hereditary office makes the heir liable to his predecessor's debts; *ergo*, an heritable office is not adjudgeable. It is said that the Earl of *Moray* purchased the sheriffship of *Moray* from *Dunbar* of *Westfield*. Let us suppose the family-estate to be quite gone, and the heir of the family of *Moray* reduced to his peerage and sheriffship; Will it be said that he cannot take up the sheriffship without incurring a passive title? Such doctrine is not to be met with in our law-books; and the pursuer will take the contrary for granted till the proposition be proved from principles, or from authority. But he has no occasion to rest upon the negative proposition. He has the express authority of the Court of Session for him. A process upon the passive titles was brought against the Earl *Marishall*; and the passive titles condescended on were, his using the title, and exercising the office. "The Lords found peerages and offices not to be "*in commercio*; and therefore that the defender's using the title of "Earl, and exercising the office of *Marishall*, infer no passive title. "*Harcus* (Heirs) 2d February 1682, *Bowar* of *Kilmidrum* contra Earl "*Marishall*." Here is a judgment in point, that an heir's taking up and exercising a hereditary office, makes not a passive title. The

reason given in the decision is, that offices and dignities are not *in commercio*, cannot be bought and sold. And it is a necessary inference, that they are not adjudgeable for payment of debt. This direct authority of the Court of Session in the pursuer's favour, is worth a hundred instances, if so many could be brought, of heritable offices being sold privately, and connived at without challenge.

It has been urged by the defenders, " That the jurisdiction of " a Baron, or of a Lord of regality, are merely territorial, are inherent qualities, or privileges belonging to the land, and go along " with the land to every purchaser." The nature of an office which has no relation to land, is very different. It may occasionally be annexed or united to land, as any two things may be united by a charter, however incapable of natural union. But such an union is as easily dissolved as it is established. Alienation of the land, by the vassal, dissolves the union; and therefore an adjudication of the land will not carry along with it the office: on the contrary, the adjudging the land is one of the ways by which the union is dissolved.

The case being reported by Lord *Arniston*, " the Lords found the " office in question adjudgeable." The pursuer reclaimed, and with the answers was given in a large excerpt from the records, tending to show that offices had deviated from their original nature, as well as land, to become *patrimonial* in place of being *beneficiary*; and therefore, that by practice offices were become the subject of commerce as well as land, though the former was not so thoroughly established as the latter. When this cause came to be considered upon the petition and answers, with the said excerpts, the Judges were all of opinion, that it was an irrational practice to subject offices, like this in question, to be distrained for payment of debt. But then it was thought that the practice had gone too far to be altered; and that it might be of dangerous consequence to many who possess such offices by legal or voluntary conveyance, to find this office not adjudgeable. And for that reason they adhered to their former interlocutor, the President alone dissenting. But they stopt there, and refused to find that the office must be carried by a service, so as to subject the heir to all the debts of his ancestor.

This judgment was affirmed upon an appeal to the House of Lords.

N^o LXXXIII.

25th November 1747.

ELIAS CATHCART *contra* WILLIAM HENDERSON.

SERVICE and CONFIRMATION.

A Factor appointed by the Court of Session for the infant children of *Quintin Dick*, to manage the funds which belonged to him, was convened in a process by one of *Quintin's* creditors to pay a debt due by *Quintin* contained in a bill. The defence was, that there was no passive title upon which he could be made liable; that the creditor had no other method but to take a decree of constitution against the infant children; and thereupon apply to the Court for a warrant against their factor. The Lord Ordinary having assailed the factor, the matter came before the Court upon a petition and answers. The Judges were all clear, that there could be no necessity of taking a decree upon the passive titles in this case; and that such a decree could not pass, because no passive title could be specified against the children, who were not the intromitters. *Elcbies* was clear, that the action was competent against the factor, as intromitter with the defunct's effects. See *Dict. vol. ii. p. 369.* *Arniston* thought it hard to give a creditor thus an opportunity of a start in diligence, where there can be no *pari passu* preference; and therefore he declared his opinion, that the pursuer ought to obtain himself decerned executor-creditor to his defunct debtor, and to confirm the moveable effects in the factor's hands, as still *in hereditate jacente* of the debtor; to which opinion the plurality agreed. And so it was found, that the creditor must confirm.

N^o LXXXIV.

4th December 1747.

WILLIAM ELLIOT *contra* Duke of BUCCLEUGH.

PERSONAL and TRANSMISSIBLE.

THE Duke of *Buccleugh*, in the year 1739, set a tack of the land and mill therein mentioned, to *William Scot* and his heirs, "and such his assignees as the said Duke shall approve of, excluding all others his assignees," for the space of nineteen years, and for a rent of L. 101, 5 shillings *Sterling*. *William Scot* becoming bankrupt, his creditor *William Elliot*, writer in *Edinburgh*, brought a process of adjudication, comprehending the said tack among other heritable subjects. Compareance was made for the Duke, for whom it was objected, that the tack could not be adjudged, in respect it was granted to *Scot* and his heirs personally, that it was not transmissible to his

his assignees without the Duke's consent, and that he did not consent that the tack should be conveyed to Mr *Elliot*.

In answer to this objection, the following arguments were urged in behalf of the pursuer. A tack is a mutual contract, implying in its nature the choice of a person; and for that reason the tacksmen can no more substitute another to labour the ground for him, than an undertaker can substitute another to build a house which he himself undertakes to build. And though tacks are made real by statute, and good against purchasers, yet still it continues law, that a tack granted to a man personally for a limited time, is not assignable by him; for it would be rendering the landlord's choice ineffectual, if he could put another in his place. But as to tacks of long endurance, to a man and his heirs, where there can be no *delectus personarum*, such tacks were found early assignable. And no wonder; for such a tack, being considered as an estate in the tacksmen's family, of which they cannot be disappointed, even by a purchaser of the land, it was natural to apply the common rules of law to this case, as well as to property, by admitting voluntary conveyances.

This introduced a distinction among tacks, as assignable or not assignable: and the question was, What tacks were of the one species, and what of the other? The following rule came to be established, arbitrary no doubt in its nature, but now fixed in practice, That liferent-tacks, and tacks for nineteen years, may be assigned, unless the contrary be specified in the tack. And the foundation of this rule will be discovered upon comparing two passages of *Craig*; talking of those who have power to grant tacks, he has the following passage. *Lib. 2. dieg. 10. § 5.* "Assedatio pro novemdecim annis, ut
"et assedatio ad vitam, species est etiam alienationis, adeo ut qui
"alienare in jure prohibentur, neque ad novemdecim annos, neque
"pro vita assedare queant." This rule naturally produced the other, That supposing no prohibition to alien, a liferent-tack, and a tack for nineteen years, may be aliened or assigned by the tacksmen. And accordingly *Craig, lib. 2. dieg. 9. § 23.* declares this to be an established rule, "Et in his assedationibus observandum, quod eas
"transferre in alios, i. e. assignatos facere, non possunt assedatarii,
"nisi aut vitalis sit assedatio, aut id specialiter sit permissum in sua
"assedatione." Here indeed mention is only made of liferent-tacks, but certainly without any view to exclude the other kind; since both are put upon the same footing in every other part of his book.

With regard to legal assignees the rule is still more general, That tacks of whatever nature are carried by escheat, adjudication, &c. And this rule is probably as old as the statute, which converted tacks into real rights. For as, by that statute, a tack in the person of the tacksmen became a real right, and an estate in him, it could not fail to be carried to singular successors by every kind of legal or judicial transmission which carry other subjects; especially in a nineteen years tack, and in a tack for life.

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The only difficulty in this case is, that assignees are excluded by an express clause in the tack. But it is answered, that a prohibitive clause can have no stronger effect here than in the settlement of a land-estate by a deed of entail. If a man be possessed of property, his creditors must have access to affect the same for payment of their debts; and a prohibitive clause cannot bar creditors, because it does not limit nor qualify the debtor's property, which must be carried by adjudication *tantum et tale* as it subsisted in him. To bar legal assignees an irritant clause is requisite, which, by forfeiting the possessor, has the effect to withdraw the subject from his creditors; for an adjudication can only carry what belongs to the debtor. The same must hold with regard to the property that is established in the tacksmen by the tack. This real right must be carried by adjudication *tantum et tale* as it is in him; and a clause prohibiting assignees, as it has not the effect to limit or qualify the real right, so it cannot bar an adjudication. Such a clause may have the effect to bar voluntary assignees, who, seeing such a clause in the tack, are put *in mala fide* to contract with the tacksmen; but such a clause cannot put creditors *in mala fide*, who, after lending their money without being acquainted with the tenor of the tack, must do the best they can to recover payment by the force of law, when their debtor fails to do them justice. And this doctrine has been received in our earliest practice with regard to all tacks whatever, without distinction. *Colvil*, 3d December 1578; Lord *Borthwick contra* Archbishop of *St Andrews*, has the following case. A tack being set with this clause, That it should not be assigned to any man of higher degree than the tacksmen himself, and the said tack thereafter falling with other things under the tacksmen's escheat; it was found that the Lord of regality, in whose hands the escheat fell, might assign the tack to a person of whatever degree, notwithstanding the said clause; because "hoc casu dominus utebatur jure fiscali; et licitum est fisco de rebus suis disponere, quando et cui libuerit, sine ulla personarum distinctione." And *Hope, tit. (Tacks),* 25th January 1615, *Elphinstone contra* Lady *Airth*, observes the like decision. And if this hold with regard to escheat, the case of creditors is much more favourable. To fortify this reasoning, it was observed, that there is a great difference put in our practice betwixt voluntary and legal assignees: a vassal cannot dispoise his feu without consent of his superior, yet the right may be carried by adjudication for payment of debt, and even by an adjudication in implement; and, to bring the argument nearer home, a tack of a shorter endurance than nineteen years cannot be assigned by a voluntary deed, and yet may be adjudged: and if a legal prohibition cannot have effect to bar adjudgers, a prohibition by paction cannot have a stronger effect.

On the other hand, it was pleaded in behalf of the Duke, That the foregoing arguments proceed all upon an erroneous foundation, by not distinguishing betwixt property and real rights affecting property. With regard to land or other subject of property, it is true

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that

that a paction, which limits not the right of the proprietor, but has only the effect of a personal prohibition, cannot bar legal assignees, whether by escheat or by adjudication. But burdens affecting property are in a very different condition: it is obviously consequent upon absolute property, that the will of the proprietor should regulate the terms of the grant made by him to affect his property. If a proprietor execute an heritable bond, intitling the creditor to uplift a certain sum out of his estate yearly for his life, or perhaps for the life of two or three of his heirs, but expressly excluding assignees, whether voluntary or legal; it is inconsistent with the principles of law that this heritable bond should be carried by adjudication. For to make it adjudicable, would be to deprive a man of his property without his consent; or which comes to the same, it would be entitling a third party, without his consent, to enter upon his property, and to levy his rents. The case is the same with regard to a tack: no man is entitled to take or hold possession of my property without my consent; and, if I have given that privilege to one for however long a time, the privileged person has not power to put another in his place, especially where he is debarred by express paction. Hence it is obvious, that to give way to the adjudication of a tack excluding assignees, is so far from being agreeable to the principles of property, that it is directly repugnant to them: it is in effect maintaining, that a limited right upon property may be extended further than the terms in which it is granted. A prohibitive clause adjoined to such a right must have its full effect; because it limits and qualifies the real right itself. A prohibitive clause adjoined to the conveyance of property, cannot, from the nature of the thing, have such an effect: if property be conveyed whole and entire, such a clause can only have the effect of a personal prohibition.

Nor is there any thing to be found in our practice contradicting these principles. It has indeed been found, that a liferent-tack is assignable, though assignees be not expressed; upon this presumption, that in a liferent-tack there is no *delectus personæ*, no choice of a good tenant, but a simple constitution of a right in favour of the liferenter. And for the same reason a liferent-tack falls under escheat. See act 15. parl. 1617. But it was never found in any case, even with regard to reversions, that either legal or voluntary assignees can come in where they are expressly excluded. And in this matter the respondent agrees with the pursuer, that a legal prohibition of assignees is equivalent to a prohibition by paction. And therefore that a tack of any shorter endurance than for life can neither be escheated, adjudged, nor assigned.

“Found, That this tack, as it expressly excludes assignees, is not
“adjudicable.”

N. B. To prove that legal assignees are excluded from tacks which do not mention assignees, *Craig's* authority was cited, *lib. 2. dieg. 10. § 6.* where he says, that a tack granted to a widow is forfeited by a
second

second marriage. His words are: "Si viduæ locatio five assedatio
 " facta fuerit, et illa maritum superinduxerit, poterit removeri, eti-
 " amsi fundus ei pro tota vita assedatus fuerit; nam cum ei, ut vi-
 " duæ, facta sit assedatio, quæ strictissimi juris apud nos est, adeo ut
 " nec assignatum admittat, non potest vidua sine voluntate sui domi-
 " ni novum colonum, nempe maritum suum, ei obtrudere; quod et
 " observandum est, five clausula hæc (quamdiu vidua permanebit,)
 " in assedatione fuerit expressa, five non; ne dominus cum quem nun-
 " quam voluit, colonum habeat." But the pursuer made an answer
 to this authority, which appeared to be solid, viz. That this doctrine
 has been copied by *Craig* from the old law, and very unguardedly
 adopted by him, and from him by *Stair*. At the time when it was
 a forfeiture for a female heir to marry without consent of her supe-
 rior, the same forfeiture was extended to, a tackswoman marrying
 without consent of her landlord. It was not skill in husbandry that
 was chiefly consulted in those days; tenants as well as vassals were
 part of the lord's *following*, when he had occasion to wage war
 with a neighbour; and no enemy, nor even stranger, was to be ad-
 mitted into the number. But when, in process of time, our laws and
 our manners became milder, such severities wore out of fashion, so
 as not even to subsist in wardholding, far less in tacks. In the next
 place, *Craig* himself lays it down, that a liferent-tack may be assign-
 ed. His thoughts then have been wandering, when he gives it as
 law, that a woman who has a liferent-tack forfeits the same upon
 marriage. For if a direct assignation of a liferent-tack be effectual,
 an indirect assignation by marriage cannot be null, far less a forfei-
 ture. And, in the third place, How, at any rate, can marriage ope-
 rate an assignation of a subject which is not assignable? And there-
 fore, supposing a liferent-tack not assignable, all the effect that mar-
 riage can have is, to bestow the power of administration upon the
 husband, leaving the tack to subsist in the wife as formerly.

N^o LXXXV.

24th June 1748.

JAMES STRANG *contra* KATHARINE CRAIG.MINOR NON TENETUR PLACITARE SUPER HÆREDITATE
 PATERNA.

JAMES STRANG of *Corsebill*, being *ab ante* debtor to *William Craig*
 in L. 1000 Scots, and having instantly borrowed from him 2500
 merks more, did, upon the 27th of May 1692, for the said *William*
Craig's further security, dispone to him heritably, under reversion,
 the twenty shilling-land of *Corsebill*, with procuratory and precept,
 redeemable as follows. "By payment of the foresaid two sums,
 " amounting to 4000 merks, with the annualrent thereof, from the
 " term of *Whitsunday* then last, and in time coming, upon the term
 " of

“ of *Whitsunday* even 1698 ; and failing thereof, upon the term of
 “ *Whitsunday* even 1701, which is the last term allowed for redeem-
 “ ing the lands : so that, if the disponent shall fail in payment of the
 “ said sum and annualrents in manner foresaid, the foresaid condi-
 “ tion of reversion, and all right of redemption, are declared to be
 “ extinct, as if they never had been, without any declarator to be
 “ purchased thereon. But, in case a declarator is needful, he con-
 “ sents that the same be pursued before the sheriff of *Lanerk*, or the
 “ commissary of *Glasgow* or of *Hamilton*.” There is likewise a clause,
 “ That in case the disponent, during the course of the said reversion,
 “ suffer two years annualrent of the principal sum to run into the
 “ third unpaid, the right of redemption shall from thenceforth be
 “ null, void, and extinct.” Then follows a clause in favour of the
 creditor : “ That, in case he shall rather desire payment of the afore-
 “ said accumulate sum with the annualrents, than to retain the secu-
 “ rity above written, the disponent shall be bound to make payment
 “ to him and his foresaids of the said 4000 merks, with the bygone
 “ annualrents, upon the said term of *Whitsunday* 1701, or any other
 “ term or time thereafter ; and, in the mean time, during the course
 “ of the said reversion, to make payment of the ordinary annualrent
 “ of the said principal sum of 4000 merks, at two terms in the year,
 “ *Whitsunday* and *Martinmas*, by equal portions ; and so to continue
 “ in the good and thankful payment, until the said reversion be ful-
 “ filled in manner above written, or declarator obtained upon expi-
 “ ration thereof.”

This disposition was obviously intended to be only a security du-
 ring the subsistence of the reversion ; leaving the debtor in possession
 of the land. Accordingly, in terms of the covenant, he entered
 into payment of the interest ; and there was produced a discharge
 granted to him by *William Craig* the creditor, bearing date the 4th
 of *July* 1693, acknowledging the receipt of 240 merks, being a year's
 interest of the sum borrowed ; and it is there specified, “ That the
 “ said 240 merks was precisely the rent of these parts of the land of
 “ *Corsehill* possessed by *James Strang*, and wadset by him to *William*
 “ *Craig*.” This document is evidence that, at this period, the rent
 of the land of *Corsehill* did precisely answer the interest of the money,
 being then at 6 per cent.

Before the date of the wadset-right, *Thomas Maxwell* of *Millhouse*
 had obtained a decree of adjudication, adjudging from the said
James Strang his twenty-shilling-land of *Corsehill*, for the accumulate
 sum of L. 408 : 6 : 8 *Scots*. As this adjudication was clearly pre-
 ferable to the wadset-right, *William Craig* was forced to purchase the
 same ; which he did for the sum of 500 merks, and took a con-
 veyance, the 18th *July* 1698, when the term of redemption was still
 current.

James Strang made no payment, excepting the year's interest above
 mentioned ; which obliged *James Craig*, as representing his father
William.

William, to bring a process of removing against *James Strang* before the sheriff of *Lanerk*, followed by a decree of removing, 21st of March 1705, whereupon *James Craig* got into possession. His father *William*, in the 1695, had obtained a charter of confirmation from the superior, upon which he was infeft, and *James* was also infeft upon a precept of *clare*. Further, in the year 1707, he took from *James Strang*, eldest son and heir-apparent of the said *James Strang* of *Corsebill*, a renunciation of all right he had, or could pretend to his father's estate.

In the year 1744, *James Strang* in *Crofthead-shiells*, grandson and heir to the said *James Strang* of *Corsebill*, brought a process against *Katharine Craig*, daughter and heir to the said *James Craig*, concluding an extinction of the wadset-right, by the intromission of the defender and her predecessors with the rents of the land of *Corsebill*. The defence was, that she was minor *et non tenetur placitare super hæreditate paterna*.

The parties did not differ about the principles that ought to govern this case, but about their application. The pursuer admitted that the defence was good, supposing the defender's father to have died proprietor of the subject. But he insisted that her father's title was no better than a right in security, and that the right of redemption is still competent.

The defender yielded, that the right was originally a security, but insisted that it was converted into a right of property by force of the paction, "that, in case the money was not paid before *Whitsunday* 1701, the right of redemption should be extinct." Possibly there may be a foundation in equity for a redemption of the land, notwithstanding the expiry of the conventional reversion. But this has no influence in the present question: it is sufficient for the defender to specify that her father died vassal in these lands. If so, she is not bound, during her minority, to enter into a question about her father's property. She would not be bound to enter into a question with a third party offering to shew a preferable right; far less is she bound when her father died proprietor, to sustain a reduction of his right upon any ground in law whatever.

The only difficulty arose from a clause above mentioned, *viz.* "That in case *William Craig* the creditor chose rather to have his money than retain the security, he should be intitled to demand payment at any time before *Whitsunday* 1691, or at any time thereafter without premonition." Whence the pursuer drew an argument, that the defender is at this day intitled to demand the wadset-sum; and that she cannot at the same time be both proprietor of the land and creditor for the price. It was answered, That no more was intended by the clause but to give an option to the creditor, either to take the land, or his money. But after making option of the land, which he did by apprehending the possession, &c. it was not intended by this clause that he should be impowered to abandon the land and to demand the wadset-sum: at that rate, if the land were

destroyed by an earthquake, or overblown with sand, the claim for the money would be entire. The case is here the same as in an adjudication: even after the legal is expired the claim as creditor remains. But if the adjudger take himself to the land by dispossessing the debtor, the debt is extinguished, and the land is his in place of the money.

In support of the defence a separate ground was urged, that the adjudication made the estate *hereditas paterna*, seeing the legal is expired, and the heir-apparent had renounced any benefit by the reversion. And it has been often decided, that an apparent heir's renunciation of the legal reversion of an apprising led against his predecessor, renders the apprising an irredeemable right of property, to exclude all after-heirs from challenging the same.

"The Lords sustained the defence."

N^o LXXXVI.

26th November 1747.

WILLIAM TAYLOR *contra* Lord BRACO.

CREDITORS of a DEFUNCT.

ARCHIBALD GEDDES of *Effel* having died 29th August 1697, *Andrew* his son and heir-apparent sold the estate to *Duff of Dipple*, 26th of April 1698. The father and son had joined in a bond of borrowed money to *John Taylor*, for the sum of L. 800 *Scots*; and this claim lay over many years, but was saved from prescription by the minority of the creditor's representatives. *William Taylor*, grandson to the original creditor, made up a title to the bond, and insisted in a process against Lord *Braco* as representing *Duff of Dipple*, concluding a reduction of his right to the estate of *Effel*, founded on the last clause of the act 24th parl. 1661, "That no right or disposition made by the apparent heir, so far as may prejudice his predecessor's creditors, shall be valid, unless it be made and granted a full year after the predecessor's death."

It was objected, That the pursuer in quoting the statute has left out the most material words, which introduce a new prescription, by providing that the creditors, to have the benefit of the statute, must do diligence against the heir-apparent and also against the real estate, within three years after their debtor's death: therefore no creditor of the predecessor who has not done diligence against his estate within the time limited, can insist upon this act of parliament nor upon any clause in it; as my Lord *Stair*, lib. 2. tit. 12. § 29. observes, where he says, "that the diligence must be completed within three years, such as adjudication or apprising, by infestment, or charge against the superior." And it is the author's opinion, that this prescription runs as well against the creditors of the predecessor, where

where the heir-apparent has disposed within the year, as where he has not disposed at all.

In answer to this it was urged, That the doing diligence by adjudication within three years, is a clause intended to regulate the preference between the predecessor's creditors, and those of the heir-apparent, which is not the present case. The prohibition to sell *intra annum deliberandi* is pure and absolute, and the predecessor's creditors are intitled to found upon it without necessity of any diligence. And to clear that this is the sense of the statute, the pursuer endeavoured to show, by stating first the defects of common law that were intended to be remedied by this statute; and next, by examining the remedies that were applied. With respect to the first, the defects which the legislature had in view are clearly expressed in the narrative: "Our sovereign Lord, &c. taking into consideration, that apparent heirs, immediately after their predecessors death, do frequently dispose their estates in whole or in part, in prejudice of their predecessors lawful creditors, before their death come to their knowledge, or before they can do lawful diligence against the said apparent heirs, and which disposition the said apparent heirs do often make before they be served heirs and infest." Here is an evil, and a great one. During the *annus deliberandi* an heir-apparent is protected from diligence, that he may have time for deliberating whether he will undertake the succession yea or not. It is neither just nor expedient, that, in the mean time, he should have liberty, by disposing of the predecessor's estate, to withdraw from the creditors the subject of their payment. The other evil complained of is, "That heirs-apparent suffer by collusion their predecessors estates to be comprised or adjudged from them, for payment of their own proper debts, real or similate, without respect to their predecessors creditors; though in justice every man's estate should be liable to his own debt, before the debt contracted by his heir-apparent."

The evils here complained of are of different kinds, and accordingly different remedies are applied. The natural remedy to the former is above set forth, that no heir, for a year after his predecessor's death, shall be intitled to dispose of his predecessor's estate; and consequently that no man is secure to purchase from him within the year; at least, that the purchaser must lay his account either to have the burden of the predecessor's whole debts, or to have the estate taken from him by the predecessor's creditors. The remedy to the latter is borrowed from the *Roman law*, *tit. De separationibus*, and, upon solid grounds in equity, gives a preference to the predecessor's creditors upon the predecessor's estate. But this preference is declared to subsist no longer than three years; after which period the creditors, whether of the predecessor or of the heir-apparent, shall be preferred according to their diligence. To this branch a limitation is introduced, and a most reasonable one, to give a security to the apparent heir's proper creditors, that, after attaching the
estate

estate by diligence, they be not for ever laid open to be beat out of possession by the predecessor's creditors; reserving always to the predecessor's creditors what preference they have obtained within the three years by the deed of the heir-apparent, or by force of diligence.

From this analysis it will be evident, that neither the words nor intendment of the statute can admit the construction given it by the defender. For, *1mo*, as to the letter of the law, it is express without any limitation, "That no right or disposition made by the apparent heir, so far as it may prejudice his predecessor's creditors, shall be valid, unless granted a full year after the defunct's death." And it is introduced with the proper narrative of its being unreasonable, "that he should dispoise thereupon immediately, or shortly after his predecessor's death, in prejudice of his predecessor's creditors, he having year and day to advise whether he will enter heir or not." Here it will be observed, that the limitation upon the preference given the predecessor's creditors in competition with the heir's creditors, mentioned in the former part of the statute, is not here repeated; the words are simple and absolute; nor would it be in the power of judges to supply, were they even of opinion that the statute is so far defective.

2do, The intendment of the statute affords no ground to suppose that the limitation must reach both branches. The limitation in the first branch was introduced for the benefit of the apparent heir's creditors, and of them only, that they might not for ever remain unsecure. The second branch does not at all concern the apparent heir's creditors, who may charge him instantly to enter heir without affording him any time to deliberate. It often happens that an heir-apparent has no creditors; and yet he may do great prejudice to his predecessor's creditors, by making private or collusive bargains within the year, selling an estate at an undervalue, and withdrawing the price, which in his pocket is not obvious to diligence.

And to make the intendment of the statute still more clear, it may be observed, that the first branch supposes the estate to remain with the heir. "Declares, that the creditors of the defunct shall be preferred to the creditors of the apparent heir in time coming, as to the defunct's estate, provided the defunct's creditors do diligence against the apparent heir, and the real estate belonging to the defunct, within three years after the defunct's death." Now a limitation upon the predecessor's creditors attaching the estate in the person of the heir, that their preference shall not subsist longer than three years, can never be constructed to regulate a quite different case where the estate is sold and does not remain with the heir.

And lastly, had any such thing been intended by the statute, as to secure a purchaser after three years, who buys from the apparent heir during the *annus deliberandi*, the limitation must have been a very different one from what is in the former part of the statute. It must

must have been in these terms, "that no declarator or reduction at the instance of the defunct's creditors shall be competent after three years against the purchaser." And as no such limitation is mentioned, it is clear that no favour was intended for a man who purchases *prohibente lege*; as indeed there ought to be none.

To sum up all in a few words, the statute, in the *first* place, supposing the estate to remain with the heir apparent, affords the predecessor's creditors three years to obtain to themselves a preference upon the estate. *2do*, It absolutely prohibits alienations within the *annus deliberandi*. And *3tio*, If the estate be sold immediately after elapsing of the *annus deliberandi*, whatever preference equity may award to the predecessor's creditors before those of the heir-apparent upon the price, it is certain they have no remedy against the purchaser.

As to the citation from Lord *Stair* above mentioned, it will be evident at the first glance, that his meaning is not to limit within three years the reduction competent to the defunct's creditors against the purchaser who buys *intra annum deliberandi*. Talking of the preference given to the defunct's creditors in competition with the heir's creditors, he observes justly, that the real diligence must be completed within the three years. Then he goes on shortly to hint, that heirs cannot dispose of their predecessors estates *intra annum deliberandi*, and concludes with this passage, "Therefore this preference of the defunct's creditors prescribes in three years, or rather in two years; because, within the year of deliberation they cannot pursue unless the heir enter or immix." This passage relates obviously to the preference given to the predecessor's creditors in competition with those of the heir, and not to the restraint heirs are put under during the *annus deliberandi*, though mentioned in the immediate foregoing clause, which must be considered in some measure as a parenthesis. And it is not uncommon with this author to introduce a hint of one subject in the middle of another, which, in regularity of composition, would do better apart. But his Lordship explains this matter more distinctly in another passage, p. 466, at the head, "This preference of the diligence of the defunct's creditors, to the diligence of the heir's proper creditors, is only, if the same be complete in three years after the defunct's death, wherein the *annus deliberandi* is contained: but in that year the heir can make no valid voluntary disposition."

"The Lords found the reason of reduction relevant and proven."

N^o LXXXVII.

10th February 1748.

FORBES and others *contra* The Earl of KINTORE and others.

EXECUTION.

THE Earl of Kintore, Forbes of Craigievar, and others, had long enjoyed, in form of a society, a conjunct possession of fishing
 O o salmon

salmon in the river *Don*, by means of cruives erected in that river, when they were attacked by Lord *Forbes* and other heritors upon the upper part of the river, concluding in their process, that the defenders should demolish their cruives, damages, &c. A no-process was objected upon the act 6th parl. 1672, to wit, that, in the execution against *William Brebner* one of the defenders, none of the other defenders were mentioned. *Answered*, That neither the statute nor any practice hitherto observed, requires that where a summons is executed at different times against several defenders, every execution ought to recite the names of the whole defenders; witnesses, processes of ranking and sale; improbations against creditors; processes against debtors, and others of the like nature; where the practice is to name only that single defender who is cited in the execution.

The Lords sustained the objection upon this ground, that the defenders were all connected together, and that it was necessary to call every one of them in the process. But it was the opinion of the Court, that in a process against several defenders, having no connection with each other, the objection is not good. For there, though all the parties be called in one summons, yet the case is the same as if there were as many different processes as there are different defenders, in which case there must be an execution against each of the defenders separately; and the bringing them all into one summons makes no difference as to this point.

In this cause the Lords were of opinion, though they had no occasion to give judgment, That sustaining the objection of all parties having interest not being called, must have a further effect than barely to sist process till the party left out be brought into the field, by a new process to be conjoined with the former; that it must have the effect to cast the process altogether, leaving the pursuer to bring a more regular process. And this seems to be agreeable to the forms of the Court; For, if a party be not bound to answer, in respect that all parties having interest are not called, nothing remains but that he be dismissed from attending the Court.

N^o LXXXVIII.

11th February 1748.

AGNES GALL *contra* MAGISTRATES of *Forfar*.

P R I S O N E R.

AGNES GALL having raised letters of caption against *Alexander Binny* provost of *Forfar*, for payment of L. 1000 *Scots* contained in a bond, gave the same to a messenger, who, having apprehended the debtor, delivered him to *John Jaffray* one of the bailies of *Forfar*, with a charge to put him in prison: but the bailie, in place of doing his duty, allowed the debtor to escape. This produced a process against the burgh, in which the magistrates and town-council were called, concluding payment of the sum with damages. The Court

Court having adhered to an interlocutor of the Lord Ordinary, finding "the defenders, and their successors in office, liable as representing the community of the burgh of *Forfar*," the magistrates reclaimed, admitting that when a debtor is delivered over to prison, he is in custody of the incorporation, as the incorporation is bound to perform the service of *warding* as well as of *watching*; and therefore if they fail in this service, they must be liable. At the same time it was contended, that the incorporation is not liable to the service of searching for and apprehending rebels; that magistrates indeed are bound, *qua* officers of the law, like sheriffs, messengers, &c. but not as representing the town; and consequently that the neglect of this service must affect them personally and not the corporation.

"The Lords adhered upon this ground, that though Bailie *Jaffray* was not bound to take the rebel off the messenger's hands, but only to take care that no insult was offered him in doing his duty; yet since he received the rebel within the town, this act was a legal delivery of the rebel to the town, just as much as if he had been delivered to the jailor; and that the town must be liable for the rebel's escape, as it would have been if the escape had been from prison.

N^o LXXXIX.

10th February 1748.

AGNES GALL *contra* The MAGISTRATES of *Forfar*.

EXECUTION.

A Messenger by virtue of a caption against *Alexander Binny* provost of *Forfar*, having seized him within the town, delivered him to *John Jaffray* one of the bailies to be put in prison. But the bailie having suffered the debtor to escape, a process was brought against the town for the debt contained in the bond. Among other defences it was objected, That the execution of the messenger is defective in its most essential solemnity; not bearing that a charge was given to Bailie *Jaffray* to imprison the debtor. And to understand the nature of the objection with the answers, the execution writ upon the back of the letters of caption, must be set forth, which is of the following tenor: "At *Forfar* the 28th January 1745 years, I *Charles M'Hardie* messenger, delivered a full copy of the within caption, with a charge upon the back thereof, with the person of the within designed *Alexander Binny*, to be detained in the prison of *Forfar*, in terms of the within caption, before these witnesses, &c."

With regard to this objection it was premised, that in executing the King's letters, it is the duty of the messenger, *imo*, to signify or declare to the party the will of the letters; and to charge him to

to obey the same ; 2^{do}, to deliver to the party a note in writing of what he is charged to do. The words pronounced by the messenger acquainting the party that he must do so and so, are called the *Charge* ; and the note delivered to the party is called the *Copy of the charge*. And upon the whole the messenger frames an instrument, which is called the *Execution of the charge*.

It appears then that the most essential part of the solemnity is neglected, *viz.* the charge, which ought to be given *viva voce* to the party. The execution affirms no more, but that the messenger delivered to Bailie *Jaffray* a full copy of the caption, and a charge upon the back of it, with the person of the debtor. The execution is evidence that a copy was delivered of a charge, which was one branch of the messenger's duty : but it is not said, that the messenger intimated to Bailie *Jaffray* the will of the letters, and charged him *viva voce* to incarcerate the prisoner, which was the principal branch of his duty. Nor is this to be looked upon as a minute objection : for, where so great trust is given, every step of the execution ought to be followed out with the greatest precision. And, were messengers allowed latitude in this matter, they might be the occasion of much mischief : and daily experience shews, that they are abundantly prone to take liberties. This execution is perfectly consistent with the following supposition, that the copy of the caption, with a written charge on the back thereof, were slipped into the bailie's pocket, or put into his hand, without being told what was the intendment of it. And the corporation who are brought in to answer for the alleged delict of one of their magistrates, are at liberty to suppose any fact that is not contradictory to the execution.

It was *answered*, That the execution is in the common style ; that a debtor is charged with horning in no other manner than by delivering to him a copy of the charge ; that when a summons is executed personally, the execution certifies no more but the delivering to the defender a copy of the summons ; and that such delivery does in law imply an antecedent charge given *viva voce*. To this it was *replied*, That the execution of a summons bears expressly, that the party was "summoned, warned and charged ;" after which follows the delivery of a copy of the charge, "This I did conform to the summons, whereof I delivered a double, with a just and authentic copy " at the end thereof." And the like is observed in other executions. And in general no legal solemnity is presumed, but must be expressed.

" The Lords repelled the objection."

N^o XC.

3d June 1748.

Sir JOHN HALL of *Dunglafs contra* WILLIAM NISBET of *Dirleton*.

H Y P O T H E C.

BY a tack from *Dirleton*, *John Martine* became bound for thirty-six bolls two firlots bear, and four bolls oats, of the growth of the lands; which in common form he was taken bound to deliver betwixt *Yule* and *Candlemas*. Execution having been taken out against him by Sir *John Hall* a creditor by bond, a poinding was begun of the corn-stacks in the yard, 16th *January*. *Dirleton's* chamberlain interposed for behoof of his master, to secure the current year's rent. The poinder offered to find caution to pay the rent when it should become due. This offer was refused by the chamberlain for the following reason, That as *Candlemas* was approaching, and as *Dirleton* was intitled to have the *ipsa corpora* of the corns for his rent, he could not be bound to accept caution in place of the *ipsa corpora*; especially as this offer can bear no other construction but to pay money in place of victual. The interruption of the poinding produced a process against *Dirleton* for damages, who put in the following defence, That his chamberlain acted legally in stopping the poinding; seeing there was no offer to set aside corn sufficient for the year's rent.

And, in support of this defence, the following topics were stated. Originally every thing upon a man's estate was considered to be his property, horses, corns, &c. without distinction, whether possessed by himself or his tenants; nay, even his tenants were considered in some measure as his property, and could be transferred with the land. But bondage wore out by degrees; and, after a tenant came to be considered as a free man, and capable of holding property of his own, it was reckoned a hardship that his goods should be subjected *per aversionem* for payment of the landlord's debts, which was every day done by the brief of distress. This was remedied in part by the act 36. parl. 1469, statuting, "That from henceforth the poor tenant shall not be distressed for the lord's debt, further than to the extent of a term's maill:" and even this power, restricted as it is, has since gone into desuetude; most reasonably.

But there is one consequence from this original constitution, which still remains *in viridi observantia*. Though the property of the landlord in the tenant's goods came to be restricted as in the said statute, the landlord is still considered as proprietor of all the corns growing on his estate, so long as any of the rent of that crop remains due to him. It is upon this footing that an action is competent to the landlord against all intromitters with the tenant's corns; which is properly a *rei vindicatio*, whereby he can call back the *ipsa corpora*

of the corns, or any part, till the last farthing of his rent be paid. Whence it follows, that where the rent is payable in kind, the tenant has no access to sell a boll of corn till the landlord's rent be paid: this boll is claimable by the landlord as his property, and he can demand it *a quocunque*, as part of his rent.

The regulation must be different where the rent is payable in money. A tenant cannot raise money but by making sale of his corns and stocking; and it would be absurd to give the landlord a privilege to bar this commerce, and with the same breath to oblige his tenant to pay him money. This would be the *Egyptian* method of exacting bricks without affording straw: all the landlord can justly do in this case, is to exact caution *currente termino*, where the tenant is disposing at large, or where the tenant's creditors are carrying off his effects.

But when the rent is payable in kind, there is no instance of obliging the landlord to accept security, even when the poiding is *currente termino*; and it would be robbing the landlord of his property to oblige him to accept security: the corn is his property to the extent of the rent of that year: he draws his rent out of that crop, and no mortal is intitled to touch the crop till his rent be set aside. And taking the contract in the strictest sense, that the tenant is not bound to deliver till *Yule*, or perhaps till *Candlemas*, it is still the landlord's privilege to have the first corns that are threshed set aside for his use, to be delivered to him when the term shall come.

Hence it must appear a downright inconsistency, to oblige the landlord to accept caution where his rent is payable in victual. Let us consider that the tenant is bound to deliver the victual of that very possession as his rent. Payment, therefore, in money will not answer, nor in victual of the growth of other lands. What place is there then for caution? Were sufficiency of victual left to answer the rent, there might be some pretext; but to oblige the landlord to accept caution, where the poider runs away with all the victual, is, in other words, to say, that the tack is not binding, and that the landlord cannot demand the rent stipulated.

In the *second* place, as the victual was deliverable betwixt *Yule* and *Candlemas*, it seems clear that the landlord may claim as his rent, any corns threshed after *Yule*. When victual-rent is deliverable betwixt *Yule* and *Candlemas*, no more is intended by this *laxamentum temporis*, but to give the tenant time to thresh out his corns. If he keep them in the yard, the landlord has nothing to say before *Candlemas*; but if they are threshed out, what interest or what pretext can the tenant have to detain them from his landlord after *Yule*? Now, as the creditor could not complete his poiding without threshing out the corns, the defender says, that these corns, when threshed out, were his property to the extent of his rent. The term of delivery was come, being after *Yule*, and therefore he could lay hold of

of the corns as his property, and was not bound to accept any caution.

“ Found, that upon the interposition of the defender’s chamberlain to stop the poinding till his master’s rent, which was payable in victual, was satisfied and paid, the offer of a responsal man as caution for payment of the said rent, without offering to set aside as much of the victual as would satisfy the rent, was not sufficient to intitle the pursuer to proceed in his poinding, nor to debar the defender’s chamberlain, upon the right of hypothec, to stop the poinding.”

N^o XCI.

3d June 1748.

ALEXANDER GORDON of *Ardoch* contra WILLIAM SUTHERLAND of *Little Torboll*.

PROVISION to HEIRS and CHILDREN.

THE contract of marriage betwixt *John Sutherland* of *Little Torboll* and his spouse, begins with an obligation upon him, “ duly and sufficiently to invest and lease *Anne Ross* his promised spouse in liferent, and the heirs-male lawfully to be procreate betwixt them in fee, in all and haill the town and lands of *Little Torboll*, &c. And, for that end, to grant to them sufficient charters, containing precepts of sasine, &c. And which investments, lands and others, the said *John Sutherland* binds and obliges him and his foresaids, to warrant to be good and sufficient, free, safe and sure to the said *Anne Ross*, and said heirs-male, for her liferent of the sum of L. 360 Scots, as the annualrent of the principal sum of 9000 merks, in case she be the longest liver; and for the said heirs-male their right of fee, from all and sundry prior investments, inhibitions, adjudications, liferents, annualrents, cesses, taxations, and other public burdens whatever, at all hands and against all deadly.” Follows an assignation to the maills and duties in favour of the wife and the heirs-male for their respective rights of liferent and fee, to take effect after the said *John Sutherland*’s death; and to this is subjoined an assignation to the writs and evidents, and an obligation to make the same forthcoming to them, as accords; “ Which assignations respective, the said *John Sutherland* binds and obliges him and his foresaids to warrant to the said *Anne Ross* and heirs-male, from his own proper facts and deeds, *done or to be done* in prejudice hereof.”

This contract bears date in the 1714, and in the year 1717, an inhibition was served upon it in behalf of *William Sutherland* eldest son and heir of the marriage. In the year 1725, *John Sutherland* the father borrowed from *Alexander Gordon* of *Ardoch* 5500 merks, and granted him a real security upon the land of *Little Torboll*. The creditor

creditor having adjudged, brought a process of sale after his debtor's death; in which compearance was made for the said *William Sutherland* the heir-male, who insisted, that by the inhibition the pursuer was interpellated from lending money to *John Sutherland* of *Little Torboll*, in prejudice of the obligation he was under to settle the fee upon the heir-male of the marriage; and therefore that he could not bring the estate to a sale in prejudice of him the heir-male. The pursuer urged several passages from *Stair* and *Mackenzie* to prove, that an inhibition upon a contract of marriage is no bar to the contracting onerous debt. In answer to which, and in support of the objection, the counsel for the heir-male reasoned as follows.

It was premised that the pursuer's arguments are founded upon a mistake, as if provisions in favour of heirs of a marriage contained in marriage-articles, were all of the same import; whereas, contracts of marriage may be as different in their tenor as any contracts or deeds whatever; and therefore to judge of the effect of an inhibition served upon a contract of marriage, the special clauses of the contract must be attended to. More particularly, where a man in his contract of marriage settles or becomes bound to settle his estate in favour of the heir-male, or of the heir of the marriage; such settlement, or obligation to settle, though it imply more than a simple destination, has no further effect than to imply a prohibition upon the father to alter the order of succession: therefore he performs his obligation by leaving his estate to descend to that heir, *tantum et tale* as it is at his death. Contracting of debt, or even selling *part* or *whole* of the estate, is no infringement of such obligation: rational deeds are no infringement, such as granting provisions to younger children, or making settlement in a second contract of marriage: nay, gratuitous deeds are no infringement, if they be not done *eo intuitu* to disappoint the heir of his hope of succession, in which case they are fraudulent deeds. This is the sense of the pursuer's quotations from *Stair* and *Mackenzie*. And as it is agreed on all hands, that clauses so conceived have no other meaning, than to bar the husband from altering the order of succession, and by no means to debar him from contracting debt, or doing any reasonable act of administration, inhibition upon such a contract would be a vain diligence: for, inhibition cannot alter the nature of an obligation, nor bind a man further than he is bound by the deed upon which it is founded. Therefore, in the case observed by *Durie*, 18th January 1622, *Laird of Silvertounbill contra* his father, inhibition was refused upon a contract, where the father was no further bound than to settle his estate upon the heir of the marriage. And inhibition was also justly refused in a similar case observed by *Dirleton*, 7th January 1675, *Innes contra Innes*; where a sum of money was provided to the husband and wife, and the heirs-male of the marriage: and the like, 24th January 1677, *Graham contra Rome*.

But

But now, if a marriage-settlement be so conceived as to oblige the husband to denude of his estate in favour of the heir of the marriage, upon his existence, or at a certain age; or be so conceived as to bar the husband from alienating the estate, or contracting debt in prejudice of the heir of the marriage; none of our authors make a doubt that inhibition upon such a contract will secure performance of the obligation, and be an effectual bar against contracting debt. Thus, inhibition being raised upon a contract of marriage where the husband became bound "to invest himself in certain lands betwixt
"and a precise day, about a year after the marriage; and immediately thereafter, to resign for new investment to his future spouse
"in life, and to the heirs of the marriage in fee;" reduction by the inhibitor was sustained of an onerous disposition granted after the inhibition; because the clause inferred a prohibition upon the husband to grant any voluntary right in prejudice of the provision, *Hume*, 22d July 1724, *Douglas contra Douglas and Drummond*. And in a contract of marriage, in which the husband "became bound to join the
"sum of 3000 merks, with 17,000 merks of portion received with
"his spouse, and to lay out the same upon good security to himself
"and spouse, and longest liver in conjunct fee and life, and to
"the children of the marriage in fee; and how often the sum
"should be uplifted, that he should so often re-employ the same in
"the above terms;" the man having died bankrupt, action was brought against the cautioner who was bound with him in the contract. His defence was, that the obligation barred only gratuitous deeds, and was no impediment to the husband from laying out the money upon trade, though it should be sunk thereby. But the Court found the import of the obligation to be, that in all events this sum should be secured to the children of the marriage; and therefore sustained action against the cautioner for replacing the sum. 'Tis true there was no inhibition upon this contract, and so the present case came not to be determined in point. But the *ratio decidendi* is the same; for from this clause was inferred a prohibition to contract debt in prejudice of the children of the marriage; upon which, if inhibition had been served, a reduction upon that head must have been competent even against onerous creditors, upon the precise same footing that an action was sustained against the cautioner.

And here in general it must be observed, that, as in many instances the Court has sustained actions against the husband or against his cautioner, for replacing sums or subjects evicted by onerous creditors, these are all of them so many authorities to the present point. A man who in his contract of marriage reserves to himself a power of contracting debt, and of doing other rational acts of administration, cannot be bound to replace the subject or sum when it is evicted by onerous creditors; because such is the condition of the settlement made upon the heirs of the marriage. As little can

his heirs or cautioners be liable; and upon the same foundation inhibition upon such a contract would be a fruitless diligence. But if it be either expressed or implied in the contract, that the subject is to be made effectual to the heirs of the marriage whole and entire, the husband must be liable; if the subject be evicted, his cautioner must be liable; and an inhibition upon the contract will be effectual to bar creditors.

Nor is this a new or singular doctrine: what is above laid down coincides with a practice well known in the Court of Session concerning tailzies. Before irritant and resolute clauses were invented, inhibition was the only method for securing entails; and it was a method commonly practised, provided an entail either bore or implied a clause *de non alienando, et non contrahendo debitum*. An inhibition upon such negative obligation was ever held sufficient to bar even onerous deeds; *vide Hope's Minor Practiques, voce (Tailzies.)* In the present case, there is more than an implied prohibition to contract debt in prejudice of the entail or settlement in the contract of marriage: there is an express prohibition, the heir of the marriage being warranted against all debts and deeds of his father.

“ Found, That the fee, by the contract of marriage, remained
 “ with the father, and that only the *spes successionis* was vested
 “ in his son; and therefore that the inhibition does not strike
 “ against the father's onerous contractions.”

In advising this case, the principles above laid down were not controverted. But the interlocutor was founded upon this opinion, that the contract under consideration, which indeed has been the work of an ignorant writer, did not import more than a hope of succession, and was not meant to bar the father's power of contracting debt, nor of alienating for onerous causes.

This judgment was affirmed in the House of Lords, 7th March 1751.

N^o XCII.

7th June 1748.

DANIEL MIDWINTER and other Booksellers in London contra GAVIN HAMILTON, &c.

DAMAGE and INTEREST.

THE art of printing, among other advantages, enabled authors to make more profit by their works than they could do formerly. The profit indeed at first could not be considerable; for a book once published became every man's right or property, which disabled undertakers from giving any great sum for a performance, however valuable. This commerce deserved to be put upon a better footing for the encouragement of authors; and it was put upon a better

better footing in most civilized countries by the prerogative of the Prince, who took upon him to grant to authors, when he thought proper, an exclusive privilege or monopoly of their own works for a certain term of years. This in particular was frequently practised both in *England* and *Scotland*; though it may admit some doubt, whether a monopoly of this kind, being against the common rights of the subject, can be justified by the common law of the land.

To make this privilege general, without necessity of applying for a grant from the Crown; and perhaps to remove objections that might lie against the Crown's grants; the act of Parliament 8th of Queen *Anne* was made, intituled, *An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.* The regulations of this statute, so far as material to the present case, are as follow: 1^{mo}, "The author of any book, and his assigns, shall have the sole liberty of printing it for fourteen years. And if any person within that time, shall print, reprint, or import such book, without consent of the proprietor; or knowing the same to be so printed, or imported, shall publish or expose it to sale without such consent; the offender shall forfeit the books and sheets to the proprietor, who shall damask and make them waste paper; and further, shall forfeit one penny for every sheet found in his custody printed or printing; one moiety to the Crown, the other to him who shall sue for the same. 2^{do}, No person shall be liable to these forfeitures, unless the title to the copy of the book shall, before publication, be entered in the register-book of the company of stationers; and unless the consent of the proprietor be also entered. 3^{do}, The printer shall deliver nine copies of each book to the warehouse-keeper of the company of stationers for the use of the libraries therein mentioned; and upon default, shall forfeit the sum of L. 5, for every copy not so delivered; as also the value of the copy to be recovered for the use of the said libraries, with full costs of suit. 4^{to}, If any action shall be brought for any thing done in pursuance of this act, the defendant may plead the general issue. 5^{to}, All actions for any offence against this act shall be brought within three months after the offence done. And lastly, after the end of fourteen years, the sole right of printing or disposing of copies shall return to the authors, if then living, for other fourteen years."

Some booksellers of *London* brought a process against the booksellers of *Edinburgh* and *Glasgow*, setting forth, that the defendants had all of them presumed to transgress the said statute, by printing, reprinting, or importing, or publishing and exposing to sale, the several books specified, without consent of the proprietors; and therefore concluding for the penalties and forfeitures of the statute; at least, that the defendants ought to pay damages to the complainants for every surreptitious copy. The pursuers not being
able

able to bring evidence by witnesses of any act transgressing the statute, waved all penalties, and restricted their libel to damages, or rather to the profits which the defendants were supposed to have made by dealing in an illicit trade; and to bring out the extent of these profits, they prayed a discovery by the oaths of the defendants. The claim for damages thus restricted was put upon this footing, that by the statute a property is given to authors of the books published by them, which of itself is sufficient to found a claim for damages; because every proprietor is entitled to reparation and damages at common law against those who encroach upon his property. The property of every book (said the pursuers) is declared by the act to belong to the author and his assigns; which implies that this proprietor shall be entitled to every competent action for defending his property against the unjust invasions of others, and obtaining relief to the extent of his real interest or damage. And the relief arising from the property thus declared, cannot be barred or excluded by the special penalties superadded in the statute; which were intended as a further restraint against the wrongs and abuses recited in the preamble, but could never be intended to put proprietors of books in a worse condition, than if such penalties had not been enacted.

The defendants, on the other hand, to prove that no action of damages can be sustained upon this statute separately, nor upon it conjoined with the common law, premised the following observation. It is a rule, that laws which abridge the common privileges of mankind are strictly to be interpreted: monopolies and restraints are introduced by statute contrary to natural liberty, debarring the lieges either absolutely, or in favour of certain persons, from doing certain things which are otherways innocent and lawful. But whatever be the expediency of such statutes, they are not to be extended by judges beyond their precise terms. It would be gross injustice so to extend them: it would be abridging natural liberty without the authority of law, which is worse than private violence. Thus members of the College of Justice are prohibited to purchase pleas, under a penalty that the purchaser shall be degraded from his office. But as such purchases are not declared null and void, the purchase is effectual in law. Hunting in woods, parks, &c. without licence of the owner, is discharged by statute under certain penalties. Here is a monopoly of wild-fowl granted to every gentleman within his own inclosures; yet if one transgress the statute, the proprietor may sue for the penalty, but has no claim for damages, not even a claim for the wild-fowl taken. There are many statutory penalties against those who kill salmon in forbidden time: by this practice those who have right to salmon fishing undoubtedly suffer; yet as this is only a statutory wrong, no action of damages can lie; because such action is not given by any of the statutes. And yet the prohibition of dealing in privileged books, is not stronger than the prohibition of killing salmon in forbidden time. The like observation occurs upon

upon the statutes prohibiting cruives in salt-water under certain penalties. Bleaching of linen-cloth with lime or pigeon-dung is prohibited under the penalty of confiscation of the cloth, and a pecuniary fine: but the purchaser who suffers thereby has not an action of damages. By the statutes establishing the post-office, private carriers are prohibited under a certain penalty to carry letters; yet an action of damages will not lie at the instance of the King or postmaster against those who transgress the law. And, not to multiply instances which are without end, Would an action of damages be competent at the instance of the *East India Company* against interlopers? Such an action was never imagined.

This doctrine in general is not controverted by the pursuers, who place their whole strength upon the above-mentioned speciality, that by the statute under consideration, a *property* is bestowed upon authors and their assigns; and therefore this argument must be deliberately examined. When a man composes a book, the manuscript is his property, and the whole edition is his property after it is printed. But let us suppose that this whole edition is sold off, where is then his property? As property by all lawyers, ancient and modern, is defined to be *jus in re*, there can be no property without a subject. The books that remain upon hand, are, no doubt, the property of the author and his assigns: but after the whole edition is disposed of, the author's property is at an end: there is no subject nor *corpus* of which he can be said to be proprietor. All that remains with him is an exclusive privilege granted by the statute, of reprinting this book, and of barring others from reprinting or vending it under certain penalties. It is neither more nor less than creating a monopoly, barring others from dealing in that particular commodity; the direct consequence of which is, that so far as restrained by statute they must submit; but that in all other particulars, their natural liberty is preserved entire.

It is true, this monopoly or exclusive privilege is named a *property* in the statute: and so it is in one sense, because it is *proper* or peculiar to those to whom it is given by the statute. But then it was not intended to be made *property* in the strict sense of the word; for we cannot suppose the legislature guilty of such a gross absurdity, as to establish property without a subject or *corpus*: these are relative terms which cannot be disjoined; and *property* in a strict sense can no more be conceived without a *corpus*, than a parent can be conceived without a child. But if the words of the statute shall be laid hold of, neglecting its spirit and meaning, all that can be concluded is, that it is a property *ad certum effectum* only, granted in order to support the several actions and penalties directed by the statute. It is a statutory property, and not a property in any just sense, to be attended with any of the effects of property at common law. And, indeed, this argument is so conclusive against the sup-

position of real property, that the pursuers have been obliged to yield in some measure to it, by admitting that this is not a real property in any subject or *corpus*, but only a *quasi* property. This is admitting all that is demanded; for let them convert this law-term into common language, and they will not be able to make it any thing different from that monopoly or exclusive privilege which is established by the statute. It is clear, then, that after all the bustle made by the pursuers about property and the effects of it at common law, they have not advanced one step. The only ground they have to take up is, to maintain, if they can, this proposition, that, from their *quasi* property or exclusive privilege, the same actions arise at common law, that are the consequence of property taken in its strict sense: but they will not venture to take up this ground, because it is untenable. Any wilful encroachment upon real property, is a moral wrong, condemned by the law of nature, and by the laws of all nations; which, therefore, ought to be repaired. But an encroachment upon a monopoly, or an exclusive privilege, has nothing naturally immoral in it, is not *malum in se*; and therefore does not fall under any sanction of the common law. It is a statutory wrong, to be judged of solely upon the statute; and therefore no action can lie to redress such a wrong, but what is authorised by the statute.

And here a reflection must occur, which cannot fail to make an impression. The argument advanced for the pursuers, taken in its strongest light, must resolve into the following proposition; that an action of damages was intended by the legislature to be one of the means for securing to authors the benefit of their own works; and that the only purpose of declaring a property to authors in their own works, was in order to found this action. If so, the matter has been awkwardly gone about; for, not to insist upon it, that this declared property is not to be found in the enacting clause, where it ought to have been, but only comes in by the by as a figure of speech; was it not much easier for the legislature to give this action of damages in plain words, without attempting such an absurdity as to declare a property, without any subject or *corpus* to which it may relate? This very consideration, not to go further, makes it extremely evident, that the legislature never intended, in this case, either a thing so inexpedient as an action of damages, nor a thing so absurd as a real property. Had they intended an action of damages, they would have said so in plain terms. And it must be observed, that though it is not in the power even of the legislature to establish property without a subject, it was very consistent to afford an action of damages without supposition of any thing like property: for an action of damages may lie upon a statute, as well as upon property, at common law.

In the *second* place, supposing so absurd a thing as that a real property is established by the statute, it appears evident that the pursuers can take no advantage of it, when they have not fulfilled the

the conditions upon which it is granted. The very first clause of the statute, which talks of bestowing the property upon the author, is what follows: "And whereas many persons may, through ignorance, offend against this act, unless some provision be made whereby the property in every such book, as is intended by this act to be secured to the proprietor, may be ascertained; as likewise the consent of such proprietor for printing or reprinting may from time to time be known; be it therefore further enacted, that nothing in this act contained shall be construed to extend to subject any person to the forfeitures and penalties therein mentioned, unless the title to the copy shall, before publication, be entered in the register-book of the company of stationers, and unless such consent of the proprietor be in like manner entered." Here two things are plainly implied, or rather expressed: *first*, that the property is not intended to be bestowed in every case; for the words are, "Whereby the property in every such book as is intended by this act to be secured to the proprietor, may be ascertained." And *2dly*, The property is not bestowed directly upon composing, but is to be claimed or ascertained in a certain form established in the statute, *viz.* by entering in stationers hall the name of the book, and the author's consent for printing the same. Upon these conditions the property is bestowed, and not otherwise. Nor does this argument land in a criticism upon words; it is founded on the very nature of the thing. For if it be true, in fact, that many persons of distinction amuse themselves with composing books, without intending to take any pecuniary benefit by the publication, must it not be competent to every mortal to deal in such books, as much as it was to deal in all books before exclusive privileges were invented? It follows, therefore, that every author who intends to make profit of his works, must signify the same to the public; or, in the language of the statute, must have the property ascertained to him. And as the method for claiming or ascertaining this property is also laid down in the statute, there must be established a *præsumptio juris et de jure*, that every new book which is not thus entered in stationers hall is abandoned to the public, and a lawful subject of commerce for every man to deal in.

In the *third* place, Supposing all obstructions removed, which bar the pursuers from a property in this case strictly taken, and suppose their property to be such as to afford the same actions that may be founded on real property; yet it does not appear that they could take any benefit from these concessions. For how are damages to be ascertained? The only footing to go upon is, to show how far the proprietor's sale is lessened by interlopers. But this can never be determined otherwise than by mere conjecture; the proprietor himself cannot be certain that the persons who dealt with the interlopers would have purchased from him; without which the ascertaining damages is beyond the reach of law. And the pursuers
tacitly

tacitly yield this point, when they agree to confine their claim of damages to the supposed profits made by the defendants. Their claim so qualified does indeed relieve them of some part of the difficulty of proof, by no means of the whole: because an interloper who has some part of a piratical edition in his possession, cannot know what profits he makes till the whole be sold off. But to let this pass; where is the foundation in law, equity, or common sense, to deprive the defendants even of their profits, unless the pursuers can specify that they have suffered thereby? If their sale be not lessened, they have no just ground of complaint. Let us give an example, which shall be *Millar's Dictionary*, published in two folios, and sold at a price beyond the reach of common gardeners. If a printer shall undertake an impression of this book on a very small type and very coarse paper, which will be purchased only by common gardeners, *Philip Millar* and his assigns will not lose a shilling by this edition: yet, by this low-priced book, knowledge in gardening is spread much to the benefit of the public. Would it be reasonable or just to deprive such an undertaker of his profits, when the public gain by the undertaking, and Mr *Millar* loses nothing? It is obvious, then, that this claim for profits cannot be supported less or more as a claim of damages, when there is really no damage to the party privileged, or, which is the same, where damages cannot be proved.

In the *fourth* place, As it has been made evident that no action for damages can lie upon this statute, nor arise out of it; it will be equally evident, that the legislature never intended to afford such a remedy against interlopers, not only for a reason given above, but also for the following reason, that it must have been foreseen, that such an action could have no other effect than to lead people into inextricable processes; it being impossible, in the nature of things, to ascertain damages in any satisfactory manner to be the foundation of a judgment of a Court. Can we believe that this matter has been overlooked by all the Princes in *Christendom*, who are in use to give privileges to authors? for we shall find not one example of giving an action of damages among the many checks that have been contrived to secure to authors the monopoly of their own works. In lieu of damages, the constant rule is, to confiscate the books, or part thereof, to the author, and to give him over and above a lump sum in name of penalty upon the transgressor. And when we consider the present statute, it is not even so favourable to authors, as are the patents which have been commonly given by sovereign Princes. Far from affording an action of damages, it does not go so far as these patents in giving a lump sum to the author in name of damages. It does not give to the proprietor even the books forfeited, which are ordered to be ~~damasked~~ and made waste paper of.

Further, there is scarce one clause in the statute that is not directly or indirectly inconsistent with this supposed claim of damages. In the *first* place, damages were not overlooked; for an action is given

given to every university for the value of every undelivered copy, with full costs of suit: damages are given in this case, because they may be legally ascertained. The same consideration must have occurred with regard to the author; but to him damages are not given, because they cannot be ascertained. *2dly*, Allowing the defendants to plead the general issue in any action or suit commenced in pursuance of this act, is a proof that the legislature had no view of damages to be claimed in a Court of Equity: every action that can be commenced in pursuance of this act must go before the courts of common law, and be determined by a jury. *3dly*, All actions, suits, &c. upon this statute shall be commenced within three months, &c. This could not have been the case, had there been any view of an action of damages; which in its nature is perpetual. And *lastly*, No action of damages can lie while the claim for the penalty subsists. Now, it is a strange action of damages which the proprietor can be deprived of, by any one commencing a popular action for the penalty. What if the proprietor shall commence his action for damages within three months, and thereafter a popular action be raised for the penalties also within the three months; Which of these pursuers shall yield to the other? for it is plain that both actions cannot subsist together. The claim for the penalty, it is supposed, would be preferred, being founded in the express words of the statute. At this rate an absolute stranger suing for penalties, shall cut out the proprietor claiming only his damages. This would be so disjointed a thing as not to be justifiable upon any sort of principles; and it may serve for an instance, that there is no end of wandering when people desert the beaten tract of the law, and seek out new paths to themselves.

The pursuers endeavoured to draw an argument to the present case, from a bill of equity in Exchequer for the single duty of beer or ale; which is sustained, waving penalties; the extent thereof to be discovered by the oath of the defendant: but in vain; for there is no similitude betwixt these cases. The act of *Charles II.* establishing the hereditary excise, provides, "That there shall be paid to the King, his heirs and successors, for ever, the duties following, &c." under the penalty of double duty upon failure of payment in the terms appointed. Here is precisely a debt established by statute; which may be recovered by a common action of debt, as well as by a bill in equity. But, will it not follow from this instance, or any such instance, that damages may be recovered either by an action of debt, or by a bill in equity, from a person who does a thing innocent in itself, and lawful by the common law of the land, and which is only discharged by statute under certain penalties? If the person take his hazard of these penalties, and pay the forfeit, he fulfils the law, and is no further liable.

Found, That no action lies upon the statute, except for such books

"as have been entered in stationers-hall in terms of the statute.

"And found, That no action of damages lies upon the statute."

N^o XCIII.

22d June 1748.

ROBERT TUDHOPE *contra* THOMAS TURNBULL.

BILL of EXCHANGE.

ROBERT TAYLOR writer in *Hawick*, having use for L. 29 Sterling, which he knew his aunt *Jean Taylor* had in ready money, and chusing to hide the borrowing from his aunt, to whom he gave himself the airs of being a moneyed man, prevailed upon *Robert Tudhope* to act the part of the borrower. *Robert Tudhope* accordingly got the money and granted his bill, dated 29th *March* 1743, and payable the 29th of *March* 1744, which *Jean Taylor* delivered to *Robert Taylor*, who was her ordinary doer, to be kept for her use with her other papers. The moment she was gone, *Robert Tudhope* delivered the L. 29 to *Robert Taylor*, and took his bill for it, of even date with the other bill, and payable at the same term.

Sometime thereafter, *Robert Taylor* pressed by *Thomas Turnbull* merchant in *Hawick* for payment of an account of L. 17 Sterling, could find no other fund for satisfying the creditor but his aunt's bill, which remaining blank in the drawer's name, he filled up his own name as drawer, and indorfed the same to *Turnbull*. Diligence upon this bill against *Robert Tudhope* obliged him to bring a suspension before the Court of Session, founding upon the counter-bill granted to him by *Taylor* as a ground of compensation, which in this case he insisted ought to be good against the indorsee as well as the indorser. And *in limine* the following fact was ascertained by the charger's acknowledgment, that the bill was indorfed to him for payment of an account of L. 17 Sterling due to him by *Taylor*, made up partly of lent money, and partly of goods furnished; and that he was to account to *Taylor* for the surplus of the bill when received.

The Lord Ordinary having repelled the ground of compensation, and found the letters orderly proceeded for L. 17, to which extent the indorfation was for a valuable consideration, the suspender submitted the following reasons to the Court, premising, That a distinction ought to be made betwixt a bill *in re mercatoria*, where three persons are concerned, and a bill betwixt two persons. The former, by saving the carriage of money from place to place, has great respect paid to it, and is intitled to extraordinary privileges. The latter, a more dangerous security than a bond, and answering no end of commerce that a bond does not answer, is intitled to no peculiar privilege more than a bond; and, if compensation be good against an onerous assignee, it ought to be equally good against the indorsee of such a bill. A bill of exchange payable to a third party is considered in law as a bag of money, which passes freely from hand to hand without any impediment. Thus it is established in practice, that compensation

compensation upon the debt of the indorser does not meet the onerous indorsee to a bill of exchange. But no statute, nor no decision has said, that a bill betwixt two persons, which can have no other effect than to be a security for debt, is endowed with the same privileges. So late as the year 1714, it was doubted in the Court of Session, whether inland bills of exchange are intitled to the extraordinary privilege of barring compensation; and it was resolved in the affirmative, upon the report of trading merchants, who all testified, that it was the constant practice. This happened in the case of *Fairholm contra Cockburn*, 24th June 1714, compiled by President *Dalrymple*. At that time there could not be the least idea that a security for money, in the form of a bill, was intitled to the same extraordinary privileges.

The Court will consider upon what footing these bills stand. They have no privilege, by act of parliament, as inland bills of exchange have; for the act 36. parl. 1696, obviously relates to bills of exchange only. It statutes, "That the same execution shall be competent, and proceed upon inland bills or precepts, as is provided to pass upon foreign bills of exchange by the act 1681." The execution provided by that act is registration and horning within six months of the date, in case of not acceptance, and within six months of the term of payment in case of acceptance; against the drawer or indorser in the former case; and against the acceptor in the latter. This is the diligence which is appointed to proceed upon inland bills and precepts, relative only to bills of exchange, where three persons are concerned. It follows then, that a security for debt in the form of a bill, having no authority from the statute, is only supported by custom. Now let us examine whether there be either reason or custom for giving such bills any privilege beyond a bond: there are reasons for giving them less indulgence, but none for giving them greater. And as for practice it has been observed, that, so late as the 1714, it was doubted, whether even inland bills of exchange had these extraordinary privileges. If, since that time, simple securities in the form of bills have acquired these privileges, it is incumbent upon the charger to give evidence of it.

In *England* such a thing is not known as a security for money in the form of a bill, where there are only two persons concerned as in a bond. The very definition given by all the writers of an inland bill, is, "That which is drawn by one merchant residing in one part of the kingdom upon another residing in some city or town, within the same city or kingdom, payable to the person expressed in the bill." And the 9th and 10th *Will. III. cap. 17.* directs the manner of presenting such bills, and of the porteur's doing diligence upon them, just as in *Scotland*. What the *English* have in place of bills betwixt two persons, are promissory-notes, binding though not holograph, and also indorsable; but these promissory-notes have no extraordinary privilege, such as bills of exchange have. And there can
be

be no reason for giving the bills under consideration a greater privilege than the deed which corresponds to them in *England*, viz. a promissory-note.

2do, It ought to be separately relevant, that the term of payment of the bill is at the distance of a full twelvemonth, which proves, that it could not be in *re mercatoria*; and therefore, at any rate, not intitled to any extraordinary privilege. What if the term of payment were put off for two years, or for three years, would the Court still bar compensation and arrestment, and would they even bar payment, if vouched only by a receipt on a paper apart? These extraordinary privileges are even denied to bills of exchange that are allowed to lie over beyond the ordinary time of negotiation. *Multo magis* ought they to be denied to bills, that by their very conception are designed to lie over, and not to have any quick or regular circulation.

3tio, Suppose the bill in question were a proper bill of exchange, yet the compensation proponed ought to be sustained against *Turnbull*. In practice we make a great distinction betwixt indorsations in the course of commerce, and indorsations granted for security of anterior debt, as well as we make betwixt bills granted in the course of commerce, and bills for security of anterior debt. An indorsation for security of anterior debt is effectual in law, but then the indorsee has none of the extraordinary privileges: he must condescend to stand upon the same footing with an assignee to a bond. Thus a discharge was found good against an indorsee, though not marked on the back of the bill; because the indorsation was not for an adequate onerous cause, nor for value given at the time, but only in security of bygone debt. *Fountainball*, 15th January 1708, *Crawfurd contra Pyper*.

The Lords at advising, gave very different opinions upon this case. *Arniston* declared strongly for the distinction above stated betwixt a bill of exchange, and a bill chosen in place of a bond to vouch a debt betwixt two persons. *Tinwald* thought that a bill containing a distant term of payment is scarce intitled to any privilege. *Elchies* was of opinion, that where a bill of exchange is indorsed for security of debt, the indorsee is not intitled to any privilege; which was the case in the decision cited from *Fountainball*. But he observed, that the bill in the present case was indorsed for payment of the L. 17 sterling, which is strictly an onerous cause, and the same as if the indorsee had paid the L. 17 in ready money for the indorsation. But the result was, to adhere to the Lord Ordinary's interlocutor, repelling the ground of compensation.

N^o XCIV.

2d November 1748.

Lady KELHEAD *contra* JOHN WALLACE, &c.

C O M P E T I T I O N.

SEVERAL creditors of Sir *John Douglas* of *Kelhead*, having arrested his rents of *Kelhead*, were called in a multiple-poining, where comparance was made for the Lady Dowager of *Kelhead*, claiming preference, by virtue of her infeftment, for security of a liferent annuity of 2000 merks; and containing an assignment to the rents, with her husband's personal obligation to pay her the said annuity. Hitherto she had not been in possession of the land, having depended upon the personal obligation for her payment; and she had not attempted a poining of the ground.

The arresters arguments for preference were these: A right of property carries the rents as an accessory, which therefore may be demanded from every intromitter. An infeftment of annualrent does not *per se* carry the rents more than the land itself; though it is a means of acquiring both by a decree of poining the ground. An infeftment of annuity is of the same nature with an infeftment of annualrent: they are not rights of property, but only servitudes upon land; and the infeftment *per se* is not a title to levy the rents, more than to enter into the natural possession of the land itself. And thus says Lord *Stair*, *tit. Infeftment of Annualrent*, § 6. speaking of the several sorts of rents known in the law of *England*: "Rent-charge is that which not being by *reddendo*, yet is so constituted, that the annualrenter may *brevi manu* point the ground therefor. We have no such annualrent, for we admit of no distrefs without public authority: but all execution must proceed by decret and precept." And in a case similar to the present, observed by *Durie*, 24th *March* 1626, *Gray contra Tenants*, it being pleaded for the annualrenter, that tho' he had a right to point the ground, he was not thereby deprived of his right to the rents, and that it was in his option to take himself either to the one or to the other: and it being answered, that the naked infeftment gives not an action against the tenants for their rents, but only an action for poining the ground; the Court preferred the arrester to the rents, seeing the annualrenter had not a poining of the ground. Nor can the creditors find a contrary decision upon record; for, in the case observed by *Durie*, 15th *March* 1637, *Guthrie contra Earl of Galloway*, where a process was sustained at the instance of an annualrenter even against intromitters with the rents, a decree of poining the ground had passed, which was the *ratio decidendi*; for the Lords were of opinion, that by taking possession upon a decree of poining the ground, the rents became the property of the creditor, and might be claimed from every intromitter.

ter. This certainly was a stretch, and which has not been followed in practice; but the creditors are not concerned, as it does not touch their case. One case more shall be cited from *Fountainball*, 5th July 1701, *Kinloch contra Rochheid*, which stands thus: An infeftment of annualrent is no sufficient title whereupon to pursue a personal action for rents, unless an assignment to the rents be contained in the annualrent-right: but an annualrenter, after obtaining a decree of poinding the ground, finding her execution disappointed by the goods being privately carried off the ground, the Lords, in a new process for the rents, found the tenant liable personally for them to the extent of the goods that were upon the ground at the time of the citation in the poinding of the ground; because the subject was thereby rendered litigious.

These things being premised, it was urged for the arresters, that the Lady must found her preference either upon her real right of annualrent, or upon the assignment to her of the rents: if upon the latter, the arrestment must be preferred, unless the assignment had been intimated before the date of the arrestments; if upon the former, a right of annualrent, without a decree for poinding the ground, so far from being a ground of preference, is not even a title to levy the rents.

The Lady, upon her annualrent-right, might as well pretend to compete with adjudgers of the land, as with arresters of the rents. She has no title either to the land or to the rents, but by a decree of poinding the ground: when she proceeds to this execution she will be preferable as to both; but without it she has no better title to the rents than to the land.

“ The Lords unanimously preferred the annuitant.”

Elcbies did not distinguish a right of property from a right of annualrent; contending, that by a right of annualrent, all that grows on the ground is the property of the annualrenter, to the extent of his debt; and that a poinding of the ground does not bestow any new right, being only necessary, like a process of mails and duties to a proprietor, to force the tenants to pay; because neither can force payment *brevi manu*. *Arniston* added, that according to the doctrine laid down by the arresters, an annualrenter is not in safety to take payment voluntarily from the tenants, but must insist in a poinding of the ground, which would make an infeftment of annualrent a very troublesome security, because of the many informalities that this execution is generally attended with.

Elcbies further observed, that in the competition of the creditors of *Naughton*, there were several annualrenters, some of whom had a disposition of the property, some not, and that all were preferred to the arresters.

The seeming difficulty of this judgment is, that upon an annuity or annualrent-right an action of mails and duties is not competent against

against the tenants, unless they have agreed to pay their rents to the creditor. And if so, what title has the annuitant to compete with the arresters about rents to which she has no right? To this the solid answer is, that tho' she cannot claim the rent directly, yet she can poid the tenant's goods to the extent of the rent, for payment of her annuity; and in this situation it would be unjust to oblige the tenants to pay their rents to the arresters, unless they should be warranted against the poiding of the ground.

N^o XCV.

10th November 1748.

SIR ARCHIBALD GRANT *contra* ROBERT GRANT of Lurg, &c.

BANKRUPT.

ROBERT GRANT having, in the year 1731, made a purchase of the estate of *Tillifour*, borrowed several sums from *Grant of Lurg*, and others, which he applied for payment of the price. *Robert Grant* had been employed by Sir *Archibald Grant*, as his factor upon the estate of *Monymusk*: this factory was, *anno* 1739, converted to a tack of the whole estate; and it was part of this bargain, that *Robert* should undertake the arrears due by the tenants, for which he granted to Sir *Archibald* an obligation for L. 800 *Sterling*. This was an unlucky transaction for *Robert Grant*, by which he lost considerably. Finding Sir *Archibald's* claim swelling every year, and being apprehensive about his other creditors who had lent their money to discharge the price of his estate, he came to a resolution to secure them in all events upon his estate of *Tillifour*. This resolution he executed the 15th *February* 1733, classing these creditors in three several bonds, upon which he proceeded to give *saime* the same day: and it came out upon proof, that the creditors knew nothing of these securities granted to them till afterward, and that it was *Robert Grant's* intention to secure them in a preference before Sir *Archibald*. This fact furnished Sir *Archibald* an objection which he proponed in a ranking and sale of *Robert Grant's* estate, *viz.* that these infestments of annualrent were null and void upon several grounds. 1^{mo}, As being granted against the original law of justice. 2^{do}, Against the authority of the civil law, and the *actio Pauliana*. 3^{tio}, Against our statute 1621. And lastly, Also against the statute 1696.

In answer to these grounds, it was premised, that there is nothing in our statutes nor practice to favour an objection against these heritable bonds, granted in security of just and onerous debts. The statute 1696 is quite out of the case. Far from being a notour bankrupt within sixty days of these bonds, *Robert Grant* continued in credit for a long time thereafter; and Sir *Archibald* himself who makes the objection, took an heritable bond from him, 28th
October

October 1734, more than a year and a half after these bonds. As for the statute 1621, it is a direct authority against the objector, because it is understood by that statute, and is established law, that bare insolvency deprives not any man of the administration of his own affairs, nor prevents him from paying or securing his creditors in what order he pleases. The only exception is, that after diligence by one creditor, the insolvent person cannot prefer any other; such preference being understood purposely done to disappoint the effect of the diligence.

If then there be any wrong to be the foundation of a reduction, it must lie upon the general head of fraud, to furnish a challenge at common law. And to make out this fraud, the following proposition must be maintained, That, after a man knows himself to be insolvent, it is wrong in him to do any deed to prefer one creditor before another; which, in other words, is maintaining that an insolvent person, knowing himself to be such, is barred by the common law from the management of his own affairs, from making payment to any one creditor, and from granting any one creditor a security. This doctrine has no foundation in the common law; because insolvency does not deprive a man of his property, nor of the administration of his property, of which payment or granting security are rational and ordinary acts. Nay, our statutes suppose a contrary doctrine: the act 1621, goes no further than to cut down a security granted to a creditor, in prejudice of a more timeous diligence used by another creditor: and it does not even cut down payment made after diligence; and the act 1696 supposes, when no diligence is done, as in the present case, that all acts of administration, such as sale, payment, security, &c. are good in law, unless executed within threescore days of notour bankruptcy.

Supposing there were any dubiety as to these points, other difficulties remain to be surmounted before the objection can be supported. In the first place, how does it appear that *Robert Grant* knew himself to be insolvent? The contrary appears from the deposition of the notary, the man he trusted, and to whom he would communicate his sentiments without disguise: he depones upon the conversation he had with *Robert Grant*, who told him, "that he was resolved to give these securities to his other creditors, because there was a fund in the hands of the tenants of *Monymusk* sufficient to pay Sir *Archibald*;" and if this was his opinion, it cannot be said that his granting a security to his other creditors was in him a wrong or immoral act.

But supposing, for argument's sake, that *Robert Grant* knew himself to be insolvent, it will not follow that he did wrong in preferring his other creditors before Sir *Archibald*; for he owed them this preference in common justice, as the very estate upon which he gave them preference was purchased with their money. On the other hand, it was a hard bargain which *Robert Grant* had unluckily engaged himself in with Sir *Archibald*; and if he was conscious, which for ought appears is the case, that he faithfully applied to Sir *Archibald*'s

Archibald's behoof whatever he drew out of his estate, it would have been unjust to have preferred Sir *Archibald* upon the land-estate, or to have brought him in *pari passu* with these creditors; so that *Robert Grant* did the honest and fair thing, when he secured these creditors upon his land-estate, which was purchased with their money, and who trusted their money with him upon the faith of that estate.

But, in the *third* place, supposing *Robert Grant* to have acted wrongously, why is this wrong to be turned against the creditors who had no accession to it? It is not alleged that they knew of *Robert Grant's* insolvency; it appears by letters in process, that some of the creditors, *Grant of Lurg* in particular, were demanding their money; and there is a letter by *Robert Grant* to *Lurg*, 1st September 1732, in answer to one craving payment, wherein he promises payment of half of *Lurg's* sum at *Martinmas*, and the other half at *Whitsunday*; adding, "but if you are positive, shall get the whole." *Lurg* therefore, when he got the real security delivered to him, considered this as no more than a piece of justice done him by his debtor; that, since he had failed in his promise of payment, he had done what was the next best, *viz.* to give him a security.

What remains only to be obviated, is the authority of the *Roman* law, which the objector in vain calls to his aid. It is very true that by the *actio Pauliana*, securities given by a bankrupt to one or other of his creditors preferring them before the rest, are rescinded; and the authority cited proves this and no more: but then it is as true that the *actio Pauliana* did not arise till the debtor's effects were sequestrated, a *curator bonis* named, and the creditors put in possession. The *actio Pauliana* was given by the prætor; and the prætor's edict, which is contained in the first law, *Quæ in fraud. creditor.* expressly mentions the creditors to be in possession. *Justinian*, describing the *actio Pauliana* in his institutes, tit. 6. § 6. makes it an express condition of giving the action, that the bankrupt's effects be in possession of the creditors. And accordingly, the established definition or description of this action given by all commentators is, "*Actio in factum competens creditoribus in possessionem missis, vel curatori bonorum adversus possessores fraudis conscios, ad res in fraudem creditorum alienatas cum omni causa restituendas.*"

"Found the heritable bonds of corroboration were fraudulent,
 "devised and made with intent to prefer the creditors therein
 "named before Sir *Archibald Grant*; and therefore reduced the
 "heritable bonds so far as to subsist only and be ranked *pari*
 "*passu* with Sir *Archibald*."

In this case a distinction ought to be made betwixt ordinary acts of management, levying rents, uplifting and paying debts, granting securities, &c. done in the prosecution of a man's affairs; and extraordinary acts, such as granting a preference to one set of creditors before another, when a man has no other prospect but bankruptcy. Insolvency merely is no objection to the first; because such acts are

done with a view to carry on affairs, and in the hopes of better fortune; and therefore are not only innocent but commendable. The second, though not properly a fraud, is a moral wrong; because, in effect, it is bestowing upon one creditor what ought to be given to all: and such moral wrong cannot be supported by a court of justice: it must be reduced, and no person allowed to take benefit by it.

N^o XCVI.

22d November 1748.

EXECUTORS of Captain CRAIG *contra* his RELICT.

H U S B A N D and W I F E.

CAPTAIN *William Craig*, 23d of May 1744, took a bond from *John Davidson of Whitehouse*, for the sum of L. 200 *Sterling*, bearing a receipt of the money at *Whitsunday* preceding; and the obligation to pay is in the following terms: "Which sum of L. 200 *Sterling*, I bind and oblige me, my heirs, executors and successors, to content and pay to the said Captain *William Craig*, his heirs, executors or assignees, at the term of *Martinmas* next to come, with annualrent of the said principal sum, from the said term of *Whitsunday* last past, to the said term of payment, and yearly and termly thereafter, during the not payment." The Captain died in October 1744, before the term of payment, and the question occurred betwixt his relict and executors, Whether the bond was moveable *quoad fiscum et relictam*. The Lord Ordinary, "in respect that neither the principal sum, nor the first term's annualrent, became payable at the time of Captain *Craig*'s death, found that the bond fell under the *jus relictæ*." The executors reclaimed, and endeavoured to make good this proposition, That a bond bearing interest at the time of the creditor's death is heritable *quoad fiscum et relictam*, equally, whether he died before or after the term of payment.

As the taking interest for money is forbid by the Canon law, subtuges became necessary in order to evade the force of the law. In *England*, mortgages and double bonds were invented: we had in *Scotland* mortgages, or proper wadsets, and annualrent-rights, which intitled the creditor not to take his interest from the debtor, but out of the rents of the land; and which in effect were a species of wadset, looseable in the same manner by premonition and requisition. After the Reformation, which set us free from the yoke of the Canon law, people began to lend their money upon personal bonds bearing a clause for payment of interest; and these new-invented securities, coming in place of annualrent-rights, were understood to be heritable like them, being in one sense *feoda pecuniæ*.

But at first when these securities crept in, people, under impression of the former practice, were generally anxious to put the stipulation
for

for interest upon such a footing as to evade this objection. One common clause was, to oblige the debtor to pay at the term, and, in case of failure, to pay interest in name of damages; which was thought less liable to objection than to stipulate interest directly. In such a case, if the creditor died before the term of payment, the bond was simply moveable, not bearing interest at that period, and consequently not being a *feodum pecuniæ*.

Sir Thomas Hope, in his *Minor Practiques*, § 103, observés, that the great variety there was in the clauses stipulating interest made the Court very uncertain in their decisions; "sometimes they judged no bonds to be heritable, except they bore a clause to infest; other times, they found a bond heritable without a clause of infestment, if it bore an obligation to pay annualrent to the creditor, as well infest as not infest." But then he concludes with this observation, "that at last they found it heritable, albeit it want both clauses, if it bear obligation to pay annualrent." And to shew that this is to be understood in general, whether the creditor die before or after the term, he puts a case in the paragraph immediately following as the only exception, the same that is above mentioned, *viz.* where the bond bears annualrent after the term of payment, in case of failzie, that, in that case, if the creditor die before the term, the bond is considered as simply moveable. And with him agrees Sir George Mackenzie, Book ii. tit. 2. § 5. pronouncing, in general, bonds bearing annualrent before the 1641, to be heritable to all effects.

But we have a greater authority for this doctrine than any of our authors, *viz.* the statute law. The act 32. parl. 1661, enacts "All contracts and obligations for sums of money, containing clauses for payment of annualrent and profit, to appertain to the nearest of kin, and to the defunct's executors and legators; but that such bonds shall not fall under single escheat, nor shall any part thereof pertain to the relict *jure relictæ*, nor to the husband *jure mariti*." And it also declares this to have been the law of Scotland before the 1641, as is above made out.

The doctrine laid down for the relict is, that bonds bearing interest, where the term of payment of interest is not come at the creditor's death, are deemed simply moveable, so as to fall under the *jus mariti et relictæ*, and to be carried by single escheat. But this seems to be a whimsical doctrine, without any rational foundation. The parties are agreed, that personal bonds bearing interest are heritable, as having come in place of annualrent-rights. All our authors say so, and the point cannot be controverted. But an infestment of annualrent has ever been held an heritable subject *a principio*, descendible to the heir at whatever time the creditor dies; even supposing him to die before the first term's payment of the annualrent; and therefore the same must hold as to personal bonds bearing interest or annualrent. If interest be stipulated from the
date

date of the bond, it is a *fedum pecunie*; and therefore heritable as well before the term of payment of interest as after.

“ The Lords adhered ; and what principally seemed to move them
 “ was, the authority of the Lord *Stair*, l. 2. tit. 1. § 4. ; and of
 “ *Mackenzie*, Book ii. tit. 2. § 9.”

N^o XCVII.

22d November 1748.

JAMES SUTHERLAND, apparent Heir of *Kinminity*, contra His FATHER'S CREDITORS.

P A S S I V E T I T L E.

ALLEXANDER SUTHERLAND late of *Kinminity*, after contracting great debts upon the faith of his two estates of *Clyne* and *Kinminity*, died in the state of apparenry as to the estate of *Clyne*. The discovery was made after his death that he was insolvent ; and the creditors followed the ordinary course of processes upon the passive titles against the heir-apparent : some of them having got decrees of constitution, deduced adjudications of both estates upon special charges to enter heir. Others, who proceeded afterward to execution, were met with a renunciation by the heir ; which obliged them to content themselves with adjudications *cognitionis causa* of the estate of *Kinminity* ; for they could not by that execution affect the estate of *Clyne*, in which their debtor was never infest.

In the name of the heir-apparent, who was an infant, a reduction was brought, on the head of minority and lesion, of the decrees of constitution and adjudication taken against him. He was reponed against the personal decerniture, and *quoad* any separate estate to which his father, the deceased debtor, had no title. But this did not answer the purpose intended by this process, which was to possess the estate of *Clyne* without being liable for the father's debts ; it being understood to be law, according to several late decisions, that the act 1695, providing for the debts of the heir-apparent who has been three years in possession, does not subject the next heir-apparent, if he only possess without making up titles. And therefore it was contended for the pursuer, that the adjudications ought to be set aside altogether *quoad* the estate of *Clyne*, upon this medium, that a renunciation given in *debito tempore*, must have confined the whole creditors to adjudications *cognitionis causa*, affecting the estate of *Kinminity* only ; and that by this neglect, the infant was barred from possessing the estate of *Clyne*, which was his right *qua* heir-apparent. 2^{do}, It was argued for him, abstracting from the lesion, that being reponed against the decrees of constitution, these decrees are reduced in effect to be decrees of cognition ; consequently that the adjudications founded upon these decrees must be considered as adjudications

adjudications *cognitionis causa*, which cannot carry any subject but what was the debtor's property.

Answered to the *first*, The creditors trusted *Kinminity* upon the faith of his being proprietor of his whole estate; and it was betraying the trust reposed in him to prefer his heir before his creditors, by forbearing to complete his titles; and the pursuer who endeavours to take advantage of this wrong is *particeps fraudis*. The statute 1695 considers him in that light, and common sense considers him in that light. The Court cannot listen to such a reduction, when the pursuer can show no lesion but the suffering adjudications to be led upon special charges, which deprives him of the opportunity to commit a palpable fraud: a lesion of this kind will never intitle a minor to a *restitutio in integrum*. Let us suppose that this pursuer, passing by his father, had obtained infeftment in the estate of *Clyne* as heir to his grandfather, which, by the act 1695, would have subjected him to his father's debts *in valorem* of the subject; Would he be intitled, upon minority and lesion, to reduce this service and infeftment, in order to possess the estate of *Clyne*, without acknowledging any of his father's debts? It is hardly thought this would be a pleadable point. Perhaps the Court might so far repon him as to protect him against being personally liable to the value of the subject; but he would be held fast upon the passive title introduced by the act 1695, so far as to afford real diligence against the estate: and there is equal good reason to sustain the decrees of constitution in the present case, so far as to support the adjudications already deduced. These adjudications being unexceptionable in point of form, ought not to be reduced if the pursuer cannot specify lesion, which he cannot specify; for he can never say that he suffers unjustly in being barred from an opportunity of defrauding his father's creditors.

Answered to the *second*, The diligence prosecuted by the creditors is strictly formal. A general charge was proper to found a process of constitution; and since there was no renunciation offered in name of the infant-defender, the creditors had no choice but to take decrees of constitution. After obtaining these decrees, they proceeded, in the common and known method, to adjudge the estate of *Clyne*, as well as *Kinminity*, upon special charges. Thus the estate of *Clyne*, as well as of *Kinminity*, became the property of the creditors, subjected only to a redemption of ten years. Here is as good a title to the estate as is known in the law of *Scotland*: and the question is, How comes this estate to be torn from them without their consent, and without a crime? The minor pleads, that he was lesed by omitting to give in a renunciation, whereby he comes to be subjected to all his predecessor's debts. Extremely well so far; and the creditors, sensible of the lesion, do not oppose the reduction of these decrees, so far as the foundation of personal diligence. But then, why should not these decrees continue effectual so far as to be the foundation of real diligence against the estate, which substantially belonged

to the debtor, though not formally? They must stand to have that effect in strict law, as well as in equity; for what is the purpose of a reduction upon minority and lesion, other than to restore the minor against the deed or diligence so far as prejudicial to him? The decrees, as to all other purposes, stand good in law, because there lies no objection of nullity against them. Thus an heir *cum beneficio* is *ipso jure* liable for the whole debts; and the benefit of inventory has no effect but to furnish an extrinsic exception, when payment is demanded from him *ultra valorem*. Thus *beneficium minorænitatis*, *beneficium inventarii*, and *beneficium competentie*, are all alike; they save the person of the debtor, but do not invalidate the debt, less or more: it remains good though it be suspended *quoad* certain effects. Here is no sort of incongruity in splitting a decree or a bond *quoad* the effects, and giving it the effect of real diligence, and not of personal; or *è contra*. This can be done without controversy by consent of parties; and it may be equally done by the judgment of a court.

“ Found, that the decrees of constitution can have no other effect
 “ than as decrees of cognition, and therefore can only affect
 “ these lands to which the debtor had titles established in his
 “ person.”

Elcbies urged the old practice, that decrees of constitution against infants were always turned into decrees *cognitionis causa*, when challenged on the head of minority and lesion. *Arniston* inveighed against the act 1695, and insisted that it was a lesion to the minor to be barred the possession of the estate of *Clyne*, when that possession did not subject him to any passive title. He said, it was also a lesion that the heir apparent was barred by these adjudications from contracting debt, to be made effectual upon the estate of *Clyne*, by the intervention of a special charge. This I could not relish; for the act 1695, certainly intended to provide for the debts of the interjected heir apparent, by subjecting the next heir *in valorem*; and it is *fraudem facere legi*, to lay hold of a defect in the words in order to disappoint the intention of the statute.

This cause was carried by appeal to the House of Lords, and was debated two full days. The Chancellor observed, that their notions in *England* about what we call correctory laws, differ widely from ours. Penal laws, he admitted, are to be strictly interpreted: but where a remedy is provided by a statute to supply a wrong or defect in common law, it was, he said, an established rule in *England*, that the Judges ought to supply every defect in such a statute, and to complete the remedy intended by the legislature; that they ought to regulate their judgments by the spirit and meaning of the statute, without allowing themselves to be limited by the precise words.

According to this rule of interpreting correctory laws, which appears

pears exceedingly rational, our Judges have done wrong in refusing to apply the act 1695 against an heir apparent, who, in order to evade the law, contents himself with possession without passing by and making up titles. The legislature undoubtedly intended a complete remedy for the disease; and the remedy is imperfect if the apparent heir can possess the estate without acknowledging the debts of the interjected heir apparent. According to the said rule, our judges may and ought to supply what is defective in the words of the statute, and to complete the remedy according to its spirit and intention.

The decree was reversed, and the decrees of constitution and adjudication were sustained with regard to the estate of *Clyne*, as well as with regard to the estate of *Kinminity*. It was the opinion of the House, that the heir of *Kinminity* was not intitled to possess the estate of *Clyne* without being liable for his father's debts; and therefore that he could not specify lesion, in suffering the estate of *Clyne* to be adjudged by his father's creditors.

N^o XCVIII.

23d November 1748.

Sir JAMES FERGUSSON of *Kilkerran* contra BENJAMIN PATERSON.

L O C U S P O E N I T E N T I Æ.

BENJAMIN PATERSON wanting to purchase the debts due by his father, and thereby get into possession of his father's estate of *Glentig*, prevailed upon Sir James Fergusson of *Kilkerran* to desist from purchasing the same, upon a promise to convey to Sir James the pendicle of *Duchary*, part of the said estate, which lies interwoven with Sir James's property. This agreement was executed by a mis-five letter delivered by *Paterfon* to Sir James, of the following tenor: *Kilkerran*, 8th September 1739, " My Lord, Agreeable to what passed
 " between your Lordship and me the other day, at your own house,
 " I hereby assure your Lordship, that if I shall have the good fortune to get right to my father's debts, which I propose to transact
 " with his creditors, in order to enable me to acquire right to his
 " estate, I shall dispoise to your Lordship the mailing of *Duchary* at
 " years purchase of the present rental thereof. I have been informed more fully since I saw you, that it is very proper that you
 " should have it in with *Knockdown*; and being so small a matter,
 " I expect more friendship by your Lordship in the country, than
 " the favour of granting this to you deserves; and hereby obliges
 " me to make over in your favour the said mailing of *Duchary*, and
 " all right that I shall acquire in security of your right thereto, at
 " the price of years purchase at the present rental. I am, &c."

In

In this letter the price was left blank, it being referred verbally to *Crawford of Ardmillan*, who, in a communing with *Paterfon*, having fixed the price at twenty years purchase, a postscript was added to the letter in the following words: *Streton, September 18th, 1739*, "My Lord, *Ardmillan* having proposed twenty years purchase to be paid by you to me for the above mailing of *Duchary*, I agree there- to, referring to your Lordship if you will give me any more. I am, &c."

Paterfon, after purchasing the debts, declined fulfilling his engagements. Sir *James* brought his action upon the missive letter, concluding, that *Paterfon* should dispoise to him the said farm of *Duchary*, &c. The defence was, that this is a mutual contract where Sir *James* is not bound, and therefore the defender cannot be bound.

In answer to this it was premised, that the argument fails, unless it can be maintained, that no bargain about land is effectual in law, unless conceived in the form of a mutual contract. This cannot be maintained; for it is a point established by inveterate practice, that bargains about land may be of all the different kinds, as well as bargains about moveables; with this difference only, that a bargain about land must be in writing.

There are three different forms by which men bind themselves to each other, mentioned by Lord *Stair* and other writers, all of them equally productive of actions at common law: the first is *promise*; the second *offer*; the third *mutual contract*. A promise is defined to be "that which is simple and pure, and hath not implied as a condition the acceptance of another." *Stair's Institute*, B. 1. tit. 10. § 3. and 4. But when an offer or tender is made, there is implied (says the author, *ibid*, § 3.) a condition that, before it become obligatory, the party to whom the offer is made must accept. According to these definitions, there is little or no difference betwixt a promise and an offer where the performance is simple, without implying any thing to be done by the other. But if the promise, or the offer, require any thing to be done by the other, the difference betwixt the two comes to be of importance. If one make an offer to sell a thousand bolls of wheat at twenty shillings *per* boll, the offer must be accepted in order to bind the person to whom it is made; and before acceptance the party may withdraw his offer; for this very thing is implied in the nature of an offer: and therefore our author justly assimilates an offer accepted to a mutual contract, both being bound thereby, *dict*. § 3. But he considers a promise as of a very different nature; the person who promises being bound, and not the person to whom it is made. Thus, if I promise simply and absolutely to deliver a quantity of wheat at twenty shillings *per* boll, the person to whom the promise is made, is not bound to accept the wheat, though he has the other bound to deliver it: and though such a promise requires something to be performed on the other part, yet it differs nothing in its nature from a simple promise to pay or deliver a sum of money

money without any condition, where the obligor is bound, and the obligee not at all.

To apply these principles to the present case, the bargain in question may be considered either as a promise or as an offer: if it be considered as a promise, the defender is bound thereby; and it is no objection that the pursuer is not bound, because such was the intention of parties: if it be considered as an offer, the pursuer has accepted the same, the letter being writ in his presence, and delivered to him, and afterward the postscript. Nor does our law know of any more solemn form of acceptance, than is inferred from receiving delivery of a deed.

And it is trifling to plead, That such a deed may be destroyed, whereby the holder will get free of his obligation. The same may be said of a mutual contract, where there is but one double: and the answer to both is the same, That the thing cannot be done legally; and as to illegal acts, there is no other fence against them, but damages and penalties.

One thing is clear, that this letter must either be null and void altogether, or be effectual without the subscription of the pursuer. It is of no moment that land is the subject of the bargain: for, as observed above, there is nothing in law to confine bargains about land to the form of a mutual contract. It is very true, that a mutual contract must be subscribed by both, or it is binding upon neither: the form of the deed requires the subscription of both; and till both subscribe, the deed is unfinished and imperfect. But the form of the deed under consideration admits not the subscription of both parties; it was perfected by the subscription of the defender, and therefore must be effectual from the moment of his subscription, or not at all. It will not be disputed, that a bargain in this shape would be effectual as to moveables; yet there is no difference betwixt land and moveables as to this particular, since the obligations are in writing. And instances of sustaining conditional obligations with regard to land, are just as frequent as sustaining them with regard to moveables.

Such conditional obligations may indeed be attended with hardships upon those who are bound, if the obligee should refuse to say, whether he will accept of performance or not. But there is a remedy in equity, if not in strict law, by a process in which the obligor will be declared free, unless the obligee declare his mind.

“ Found the defender bound by the missive letter, to dispone to
“ the pursuer the lands of *Duchary* at the price therein speci-
“ fied.”

N^o XCIX.

13th December 1748.

Younger CHILDREN of *Leffendrum contra* the HEIR.

A L I M E N T.

BISSET of *Leffendrum* died without making any settlement, leaving a son who was his heir, and seven daughters, all under age. He had a free estate of L. 2556 *Scots* yearly, beside an heritable debt of 4000 merks upon the estate of *Errol*, without leaving moveables more than sufficient to satisfy what small debts he owed. The relict life-rented L. 1128 yearly. By her advice, with the consent of the curators of the heir, a process for aliment was raised in the name of the seven daughters; and the only question was, Whether the whole aliment should be laid upon the heir, or the relict bear a part? Several decisions were cited for the mother, *Gilmor* January 1663, *Stirling contra Laird of Ottar, Stair*, 10th November 1671, *Hastie contra Hastie, Stair*, 5th July 1677, *Children of Lawriefton contra* the heir, burdening the heir only, and not the mother. And in support of this, it was declared for the mother, to be her fixed purpose to save what she could of her jointure for a provision to her children; and that, to load her with any part of the aliment, would have no other effect than to relieve the heir without profiting the other children. As this matter was submitted to the Court without opposition from the heir; it was observed, That the heir indeed is primarily liable as representing his father; but that if his estate do not afford a sufficient aliment for himself as well as for the other children, which was the present case, the deficiency must be made up by the mother, who is liable *secundo loco* to maintain her children. And accordingly L. 64 *Sterling* was modified in name of aliment, whereof L. 20 to be paid by the mother.

N^o C.

14th December 1748.

ELISABETH LINNING *contra* ALEXANDER HAMILTON.

D A M A G E and I N T E R E S T.

ELISABETH LINNING, daughter of the deceased Mr *Thomas Linning* minister at *Walston*, brought an action of declarator of marriage before the Commissaries of *Edinburgh*, against *Alexander Hamilton* younger of *Gilkerscleugh*; and as she did not pretend to have any proof of her libel by writ or witnesses, she referred the verity thereof to the defender's oath, which is in the following words: depones, "That, after the pursuer's mother's death, who was the deponent's aunt, the pursuer was invited by the deponent's father to come and live in family with him: That she accordingly came to his

“ his family about the end of *October* 1744, where she continued until about the beginning of *December* 1746: That while she thus staid in family, the deponent had frequent toyings with her, kissing and clapping her, and frequently told her that he loved her: that in *December* 1745, the deponent went one night into the pursuer’s bed-room, and slept into the bed with her, at which she seemed to be pretty much surprized, and offended; but the deponent told her, that he would do her no harm; but she having ordered him to go out of the room, he, after some little stay, went out: that next morning he observing her a little pensive, asked her the cause of it; that she told him, it was because of the ill treatment he had given her, by coming into her bed: to which the deponent answered, that he would not treat her so in time coming: notwithstanding of which he frequently thereafter, both in her room and his own, pressed her to allow him the *last favour*: and that, when she was sitting upon the deponent’s bed-side, and he in naked bed, he sometimes took her into the bed, she having her cloaths on: that in general conversation about marriage, he once said to her, that two persons giving their consent to live together as man and wife, and acknowledging one another as such, was as binding as if they were married: that this conversation was occasioned by the pursuer’s talking of a gentlewoman of her acquaintance who had fallen with child to a gentleman, who afterwards owned her for his wife. Depones, That he had frequent familiarities with the pursuer, but without actual enjoyment of her: that while he was using these familiarities, she frequently told him, that she would not yield to his embraces, unless he consented to marry her. Depones, That about the end of *May* 1746, the deponent having gone to his own room after dinner, to take a nap, which he used frequently to do, as he was lying in bed, the pursuer came into his room, as she had frequently done before, and asked the deponent some trifling question: upon which he bade her sit down upon the bed-side; and thereupon he fell a-carreッシング her, as he had frequently done before; and then he said to her, Will you make me happy? to which she returned no answer; and thereupon the deponent enjoyed her for the first time: that after this the deponent frequently had enjoyment of the pursuer: that she sometimes came to his room, where they lay in bed together for some hours; and sometimes he went to her room, where they did the same; but that they never lay together whole nights while she staid in the deponent’s father’s house: that there were none residing in the house with them, under the same roof, excepting the deponent’s grandmother and her maid: that during this intercourse betwixt the deponent and the pursuer, she frequently desired him to acknowledge her as his wife, and frequently pressed and teased him to do so, both before and after she fell with child, but mostly after she was with child, saying, that unless he did, he had made her
“ miserable;

“ miserable; but the deponent always cut her short, by refusing to
 “ go into her proposals: that one time, to put an end to her impor-
 “ tunities, the deponent showed her a scroll of a settlement, which
 “ his father had once intended to make, which he found amongst his
 “ father’s papers, whereby the deponent was to be excluded from
 “ the succession to his father, in case he married irregularly, or dis-
 “ agreeably to his father, or one that had not a suitable fortune:
 “ that in *January 1747*, the deponent employed one *Mrs Simpson*, a
 “ midwife in *Edinburgh*, to provide a room for the pursuer’s in-lying,
 “ and to attend her: but that he told the midwife nothing further,
 “ but that she was a young girl with child, who was to be brought
 “ to bed, but did not tell her name: that the deponent also desired
 “ *Mr Wood*, surgeon, to attend her there, she being then ill of a cold,
 “ and none but strangers about her; and the deponent owned to *Mr*
 “ *Wood* that the pursuer was with child to the deponent himself.
 “ Depones, that the pursuer went to the foresaid room bespoke by
 “ *Mrs Simpson*, about the 12th of *January*, and continued there till
 “ *April*, when she was delivered of her child: that, in that period,
 “ the deponent frequently visited the pursuer, but that the visits
 “ were very short; and that one night, being shut out of his own
 “ room, he came to the pursuer’s room betwixt one and two of a
 “ morning, and lay in bed with her ’till about eight in the morning:
 “ that the deponent, being about to go into the country about the
 “ middle of *April*, desired *Mr Wood* to provide a minister to baptize
 “ the child when brought forth, and to give money to the minister,
 “ and nurse’s husband to hold up the child: that the pursuer pro-
 “ posed the deponent should hold up the child to baptism himself,
 “ and stay in town for that purpose; but he refused to do either.
 “ Depones, that one time before the deponent’s enjoying the pursu-
 “ er, when he was carressing her, he desired she might allow him the
 “ last favour; which she refusing, he went off in a pet, and went to
 “ his bed, having bolted his room-door before he went to bed; after
 “ which the pursuer came to the room-door, which being shut, the
 “ deponent asked, Who was there? to which she answered, It is I;
 “ but the deponent said, he was gone to bed, and said, he was indis-
 “ posed, and would not rise: that the next day, or day thereafter,
 “ the deponent found in his room a note wrote by the pursuer, but
 “ unsigned, signifying, that she was the most miserable creature of
 “ her sex, and designed to leave the house; upon which the deponent
 “ spoke to her, and represented, that it would have a bad aspect for
 “ her to leave the house abruptly, and persuaded her not to go away,
 “ saying, that she might command his friendship, and no further;
 “ which he said so sternly, that she fell a-crying.”

The pursuer finding that this oath did not prove her libel,
 brought a new action against the defender, setting forth, that she
 was corrupted by him, and concluding for L. 1000 Sterling of da-
 mages for the loss of her virginity. In the course of this process,
 she

the founded upon the oath emitted in the former process, as a sufficient proof of her libel; and the Commissaries having conjoined the two processes, found the pursuer's libel of declarator of marriage and adherence, not proved by the defender's oath; and therefore absolved him from the adherence; but found the qualifications of his having enticed and seduced the pursuer to yield to his embraces, proved by the said oath, relevant to make the defender liable in damages to the pursuer, and modified the same to the sum of L. 500 *Sterling*.

The defender brought the cause to the Court of Session by a bill of advocacy; and the Lord Ordinary having advised with the Lords, "Remitted the cause to the Commissaries, with this instruction, That they restrict the damages to the sum of L. 200 *Sterling*, besides the full expence of process." Both parties reclaimed, the pursuer expecting higher damages, and the defender expecting to get free of damages altogether, because there was no fraud nor imposition on his part; but both equally concurring in the criminal intercourse. The Lords refused both petitions, without answers.

The Lords were far from being unanimous. Those who were for damages founded their opinion upon discouraging vice; and, no doubt, the judgment in this case will put men more upon their guard than formerly. But then it must have a bad effect with regard to the female sex, whose chastity is an object of greater importance in society than that of the male sex; for here is a temptation to lewdness, which did not exist before. Formerly, marriage was the woman's sole aim, if she was not a prostitute. But now a woman has a wider field of action. Her first view is to engage the man's affections, in order to entrap him into a marriage. If this fail, her second view, after inflaming his desires, is to yield to them; for which she is to be rewarded with a handsome portion.

N^o CI.

28th November 1748.

JOHN LANG, and other Burgesses of *Selkirk*, contra The MAGISTRATES.

COMMUNITY.

JOHN LANG, deacon of the taylor's of *Selkirk*, and other craftsmen, who, with *Thomas Elliot* late bailie there, amounted in all to the number of eighteen persons, brought a process against the magistrates and town-council of *Selkirk*, challenging them for embezzlement and misapplication of the town's revenues; and concluding, that they should be decerned to repay the sums therein mentioned to the treasurer for the time being. The defenders, without entering into the merits of the cause, insisted upon the following preliminary objections, That the pursuers had neither *title* nor *interest*

to carry on this process. These objections being reported to the Court, process was sustained and the objections repelled. Upon a reclaiming petition for the defenders, the objections were sustained. The pursuers having next reclaimed, process was sustained, and the objections repelled. It lay upon the defenders now to reclaim, which was done by an elaborate petition, containing the following arguments.

In order to set the objections in their proper light, the defenders found it necessary to premise a short view of the constitution of royal boroughs. The constitution of a royal burgh among the different nations presently in *Europe*, is borrowed from the *Romans*; or rather the constitution of such cities or boroughs as were in being during the time of the *Roman* power, is continued down to the present times, with some slight alterations occasioned by the introduction of the feudal law, and has been communicated generally to other boroughs of later creation. Our town-council corresponds to their senate: we have magistrates and office-bearers as they had, differing only in names; their consul is our provost; their prætors our bailies; their ædile our dean of guild; their decurions our counsellors, &c. They had a common-good as we have, which was understood to belong not to the particular citizens, whether *pro diviso* or *pro indiviso*, but to the politic or corporate body. Our notion is the same, with this addition derived from the feudal law, that this corporate, or politic body, is the vassal, which holds the town, with its common good, of the King as superior.

Hence in the *Roman* law, as well as in our law, the property that belongs to a corporation is always distinguished from the property that belongs to any burghers, *l. 6. § 1. De divis. rer. Universitatis sunt non singulorum, veluti quæ in civitatibus sunt theatra, et stadia, et similia, et si quæ alia sunt communia civitatum. Ideoque nec servus communis civitatis, singulorum pro parte intelligitur, sed universitatis. Et ideo tam contra civem, quam pro eo, posse servum civitatis torqueri, divi fratres rescripserunt. Ideo et libertus civitatis non habet necesse veniam edicti petere, si vocet in jus aliquem ex civibus. Again l. 1. § 1. Quod cujuscunq. univers. Si quid universitati debetur, singulis non debetur: nec, quod debet universitas, singuli debent.*

Upon the same account, burghers are in all cases admitted as good witnesses for the town, in questions concerning the town's property. *Balfour*, (witness) *Town of Leith contra Town of Kinghorn. Fountainball*, 14th June 1709, *Mackenzie contra Town of Inverness. Bruce*, 30th of November 1716, *Moncrief contra Town of Perth. The town of Inverness* having brought witnesses to prove the quantity of the mill-tures of their mill, it was found, That the present bailies could not be witnesses in a cause which concerned the common good; but that private burghers might be witnesses, though they had formerly borne office within the burgh; *Stair*, 13th June 1672, *Town of Inverness contra Forbes. And in another case, observed by Fountainball*, 17th January 1679, *Lord Hatton contra Burgh of Dundee*; the inhabitants were

were not admitted as witnesses for the burgh, where the question was, Whether the burgh had, or had not, an exclusive criminal jurisdiction? because this is a question in which every inhabitant is personally interested; whereas their common-good relates to them only as a body corporate.

Holding it then to be law, That the common-good of a burgh is the property of the corporation, not of the individuals, and that the debts due to, or by the corporation, are not due to or by individuals; the objections against the present action appear in a strong light. The libel contains two conclusions, *1mo*, A reduction of an act of the town-council, passing the town-treasurer's accounts; and the ground of the reduction is, "That certain articles are therein stated and allowed, with which the common-good of the town ought not to be burdened." The other conclusion is, "That the defenders, who concurred in this act of council, ought to be decerned and ordained conjunctly and severally to pay the sums excepted to, to the treasurer for the time being, and to take his receipt and obligation to charge himself therewith in his accounts for the current year." Here there is not a single conclusion for the benefit of the pursuers themselves, but merely for the benefit of the town: and the question is, Whether, at common law, an action is competent, more than an exception that concludes in favour of a third party, and not in favour of the pursuer? A defence of this nature would be repelled as *jus tertii*; and why an action should be sustained, more than an exception where the objection of *jus tertii* lies, is left upon the pursuer to explain.

The first objection to the process is, That the pursuers have no title; and the next is, That they have no interest. With regard to the first, this process is for misapplication of the town's revenues, arising from their common-good; which is one of the actions competent upon property; and therefore, the same cannot be competent to private burghesses or inhabitants, to whom the common-good belongs not. No burghess can say that he is proprietor of the common-good, or that he has any real estate therein, to found him in any claim for the rents. Such an action would not be competent at the instance of a partner of either of the banks against the governor and assistants, nor at the instance of a member of the *East-India* Company against the directors, nor at the instance of a creditor of the *York-building* Company against the managers, nor at the instance of a child having right to a legitim, against the father's factor: and yet in most of these cases, there is a pecuniary interest to found the action, if the party had any right in the subject itself, to be a title for carrying on such action. And this leads to the second objection, that the pursuers here are as much destitute of a pecuniary interest, as they are of a title; since the conclusion of this action is not to put money in their pockets, nor to gain them any pecuniary advantage whatever. And it is an established rule, That no man is intitled to prosecute, but for his own interest. Every man, and every

every body politic, is left to prosecute their own claims, and no man at his own hand is intitled to prosecute a claim for another, whether the other be a single person, or a body politic.

Among the *Romans* there never was such a thing imagined as an action at the instance of a private burghers for behoof of the town. See *Voet. tit. Quod cujusque univers. nomine vel contra*, § 5. and 6th, where it is said, that in every city there was a public officer, whose province it was to pursue and defend all causes concerning the town, known by the name of *Syndicus*, or *Actor universitatis*; and that it was not lawful for any other person to move any action belonging to the town. In the 7th section, he goes on to show how the *Syndicus* was created, viz. either by the set of the burgh appointing the eldest or the youngest of the council to this office; or, if there was no regulation upon this point, by an express appointment of the council from time to time.

The defenders proceeded to observe, That if this action can be sustained upon any legal footing, it must be as a popular action, competent to every one of the lieges. But it will not be seriously maintained, That any one person in *Scotland*, who pleases to give himself the trouble, is intitled to bring an action against the magistrates of any town for mal-administration: and if the matter be put upon the footing of a popular action, the private burghesses of *Selkirk* have no privilege beyond any other of the lieges. More particularly, it is true, that by the *Roman* law, private persons were allowed to bring actions, civil as well as criminal, for the benefit of the public. But as experience discovered, that such processes were oftener directed by private resentment than by zeal for the public, they are universally laid aside through all *Europe*, both in civil and criminal cases; special cases excepted, directed by particular statutes. No man is now indulged to bring a criminal accusation where his own interest is not concerned, unless it be the King's Advocate, who, for that reason, bears the name of *Calumniator publicus*. And *Voet*, upon the title *De popular. action.* makes the following observation, "*Moribus inter-
rius nostris nullus privatus actione populari, qua tali, experiri potest;
sed omnino ad privatum interesse.*" He cites *Groenewegen* for his authority, who cites many others.

But this is not all. Of a popular action, there are two essential requisites, 1^{mo}, That the matter of the action concern the public. 2^{do}, That the matter be such, as that no particular person has either an interest or title to pursue. With respect to the *first*, the administration of the revenues of a burgh is not a public concern, more than the administration of the revenues of an hospital or of a college. With respect to the *second*, there undoubtedly lies an action at the instance of the town, represented by its magistrates, against the former magistrates out of office to account for their management. And indeed, to sustain at the same time a popular action would reduce magistrates to a deplorable situation, by laying them open to a process at the instance of factious burghesses, which
may

may hurt them but cannot benefit them; for it will not be maintained, that an absolvitor in this process will afford them an *exceptio rei judicatæ* against a similar process at the instance of the burgh itself. And the consequences would be still more deplorable, could the prevention of a private burghs extinguish the town's claim: for magistrates in office would never be without a friend to bring a collusive action, in order to save them from being called to account by the town itself.

And that this is no late invented doctrine, appears from *Balfour's Practiques*, cap. 3. (anent the disposition and alienation of the common-good), where two decisions are quoted, in which the point controverted was, Whether an action, like the present, be competent at the King's instance? The words are: "Attour giff any burgh with-
" in this realm, analzies, dispones, or dilapidates the common-good,
" contrair to the known well of the same, the King's grace and his
" council has good action and interest to cause the same to be re-
" stored and redressed again *in integrum*." If it was made a question, Whether such action was competent at the instance even of the King and council, we cannot imagine that an action would have been sustained at the instance of a private burghs. And that the King is here in a peculiar situation, is obvious; for, as the common-good of almost all the burghs in *Scotland* is derived from the Crown, it is justly reckoned the King's prerogative to oversee and controul the administration of the common-good of royal burghs.

As the persuasion of the expediency, or rather necessity, of this action, weighed with the plurality of the Judges to pronounce the said interlocutors in favour of the pursuers, neglecting the strict principles of law; the defenders, in order to obviate the argument from expediency, found it material to point out another method for checking the mal-administration of magistrates, beside the action at the instance of the town represented by the succeeding magistrates, which was admitted to be but an imperfect remedy. And to this end, they gave a short deduction of that part of our public police which concerns the administration of the common-good of burghs. The danger of dilapidation, where there is no other check but an action at the instance of succeeding magistrates, was early perceived in *Scotland*; therefore, by our most ancient police, this matter was put under the superintendency of the Chamberlain of *Scotland*. And among the many instructions of articles to be inquired of by secret inquisition, and punished, contained in the *Iter Camerarii*, cap. 39. the following is one, § 45. "Giff there be an good assedation
" and uptaking of the common-good of the burgh, and giff faithful
" compt be made thereof to the community of the burgh; and giff
" no compt is made, he whom and in quha's hands it is come, and
" how it passës by the community." In pursuance of this instruction, the Camberlain's precept for holding the ayr, directed to the provost and bailies, enjoins them "to call all those who have intromit-
" ted with the town's revenues, or used any office within the burgh,

A a a

" since

“ since the last Chamberlain-ayr, to answer in sick things as shall
 “ be laid to their charge.” *Iter Camerarii, cap. 1.* And in the 3d
cap. which treats of the form of holding the Chamberlain-ayr, the
 first thing to be done after fencing the Court, is to call the bailies
 and serjeants to be challenged and accused from the time of the last
 ayr.

This office, which had too much power annexed to it, was suppressed; and the consequence was, that the royal boroughs, being left without any effectual check upon their management, Noblemen and Gentlemen of estates in the neighbourhood thrust themselves into the administration under the name of magistrates, and converted all to their own profit. This evil was complained of in the days of James V. and a remedy provided by act 26. parl. 1535. This remedy shall be considered anon. In the mean time, the following observation must occur upon the statute, that, in these days, there was no notion of a popular action at the instance of any particular burghs for mal-administration: for, had there been so ready a method for redress, strangers would have had no such opportunity to usurp upon the privileges of a burgh, as it appears they had from the narrative of the statute.

The regulations introduced by that statute, in order to prevent the evil complained of, are, *1mo*, That none be qualified to be provost, bailie, or alderman, but an indweller-burghs. *2do*, That no inhabitant in the burgh purchase lordship out of burgh, to the terror of his comburghesses. And, *3tio*, “ That all provosts, bailies, and aldermen of
 “ burrows, bring yearly to the chequer, at the day set for giving of
 “ their compts, the compt-books of their common-good to be seen and
 “ considered by the Lords-auditors, giff the same be spent for the
 “ common-well of the burgh or not, under the pain of tinsel of their
 “ freedom: and that the said provost, bailies, and aldermen, warn
 “ yearly, fifteen days before their coming to the chequer, all they
 “ quha like to come for examining the said accompts, that they may
 “ argue and impugn the same as they please, sua that all murmur may
 “ cease in that behalf.”

In pursuance of the statute, a brieve was issued out of chancery, to force the magistrates of royal boroughs to bring their count-books yearly to exchequer. The brieve, after enjoining the magistrates to bring into exchequer the rents due by them to the King, goes on in the following words: *Et expensarum dispensationis computa communium bonorum dicti burghi, si utiliter impensa vel diffuse dissipata fuerint, inspicienda.* Then follows this clause, *omnesque alios interesse baben. seu pretend. per quindecim dies ante dict. diem acto nostri parliamenti conforme, inde præmoneatis.*

There appears to have been a defect in this statute, which made it less effectual than it was designed to be: magistrates brought their count-books to the exchequer, because they were enjoined to do so under a penalty; but they brought no rental of the common-good to be a charge against themselves. This defect is remedied by

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act 28. parl. 1693, in which there is the following clause: " And
 " for preventing the like abuses, and misapplications in all time
 " hereafter, their Majesties statute and ordain, that every burgh-roy-
 " al, within this kingdom, shall, betwixt and the first day of No-
 " vember next to come, bring the Lords of their Majesties treasury
 " and exchequer, an exact stated accompt of charge and discharge,
 " subscribed by the present magistrates and town-clerk, of the whole
 " public good and revenues, and of the whole debts, burdens, and
 " incumbrances that affect the same." This completed the remedy
 for preventing misapplication of the common-good of boroughs.
 And it must be obvious, that here is a more easy and expedite me-
 thod to prevent or redress mal-administration, and, at the same time,
 much less expensive than a process before this Court.

The regulations laid down by the foregoing statutes are *in viridi
 observantia*. There is every year a precept issued out of the exche-
 quer, signed by one of the Barons, addressed to the Director of the
 Chancery, requiring him to make out a brieve for every royal-burgh.
 The brieve is accordingly made out, returned to the exchequer, and
 sent to the several sheriffs, to be served in all the royal boroughs
 within their bounds, as directed by the statute. These brieves are
 accordingly so served by the sheriffs; and particularly, it is a con-
 stant form in most of the royal boroughs, to issue a proclamation
 through the town, fifteen days before the day of appearance in ex-
 chequer, warning the inhabitants to appear there at the day named,
 to make their objections against the public accounts of the town;
 and, to give them access to frame objections, the book and counts
 are laid open for these fifteen days, to be inspected by all the inha-
 bitants.

What is done in exchequer, in obedience to this brieve, the de-
 fenders know not. Possibly, this matter may be carried on as slo-
 venly as many other articles of public police are. And if private
 burghesses, after being invited, do not think proper to appear in ex-
 chequer, and enter their complaints, the Barons are not to blame for
 not inspecting these books. But, as every private burghess is yearly
 invited to make his complaint in exchequer, where he must be heard
 summarily and *de plano*, without the expence of a process, no man can
 complain of the want of a remedy, when so direct a one is at hand,
 nor pretend that a popular action is necessary, as if no other remedy
 were competent.

The Judges will also attend to an inconveniency that must follow
 the sustaining a popular action in this court; no private burghess, nor
 number of burghesses, by bringing a popular action in this court, can
 deprive the other burghesses of a privilege established to them by sta-
 tute, to have the management of their magistrates examined and con-
 trolled in exchequer. It may happen then, that when a popular ac-
 tion is depending in this court, other burghesses will follow the estab-
 lished method of complaining in exchequer; and it may happen,
 that

that the court of exchequer approves of what is condemned here, or *à contra*. What must follow upon such contrariety of judgment in two sovereign courts? The matter is rendered inextricable by this new-invented popular action.

“ The advising the reclaiming petition for the magistrates was
 “ superseded. The pursuers, despairing of success, have not
 “ thought proper hitherto to press for a judgment; and proba-
 “ bly we shall hear no more of it.”

N^o CII.

1st February 1749.

EXECUTORS of *George Bell contra* MASON of *Clerklees*.

I M P L I E D C O N D I T I O N .

JOHN YOUNG, surgeon-apothecary in *Coldstream*, having married *Jane Mason*, without a contract of marriage; her father, *George Mason* of *Clerklees*, besides some household-furniture, gave to the husband the sum of 400 merks, as part of the tocher which he had intended for his daughter. The wife predeceased within the year, leaving a male child, named *George* after his grandfather, who was altogether unprovided. *George Mason*, being anxious to have a provision made for his grandchild, made offer to take the child home to his house, to aliment him till he was sixteen, and then to settle 600 merks upon him, provided the father would settle 400 merks. The offer was accepted, and a contract was executed betwixt the parties, *April* 1733; which, being the subject of the present question, must be particularly set forth. It is introduced with a narrative of the 400 merks and household-plenishing given to *John Young*, and of the dissolution of the marriage within year and day, leaving a male child. It subsumes upon *George Mason's* willingness to provide his said infant grandchild; and therefore he becomes bound to aliment and maintain the infant in his own family, as one of his children; to furnish him with cloaths and other necessaries, and to educate him as becomes, until he attain the age of sixteen years complete, which was calculated to happen upon the 7th *May* 1747: “ Further, he, the said *George Mason*, binds and obliges him, and his fore-
 “ saids, to pay to the said *George Young*, at the term of *Whitsunday*
 “ 1747, which will be the first term after his attaining the age afore-
 “ said, the sum of 600 merks, with penalty and annualrent after the
 “ term of payment.” On the other hand, *John Young* became bound to pay to *George Young* his son, the sum of 400 merks, at the said term of *Whitsunday* 1747, with penalty and annualrent after the term of payment.

In pursuance of this contract, *George Mason* took the child home, who died before he was three years of age. *John Young* the father, who had thus got free of his own engagement, willing to consider the

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the obligation granted by *George Mason* to the child, as a pure debt, made up titles by confirmation, and conveyed the same to *George Bell* in security of a debt due by him to *Bell*; and *Bell*'s executors, after his death, insisted in a process against *George Mason* for payment of the said sum of 600 merks, provided by him in the said contract to the infant, the term of payment being now come. The defence was, that this being a gratuity settled by the defender upon his infant grandchild, as a provision when he should arrive at the age of sixteen, the term of payment is that very day when the child has completed the age of sixteen; but that this term never did exist, and cannot now exist; and therefore, as a sum cannot be demanded before the term of payment, the sum in question can never be demanded.

The Lord *Elchies* Ordinary repelled the defence for this reason; that the sum was made payable at a day certain, viz. the term of *Whitsunday* 1747; and his Lordship took the maxim strictly, that *dies incertus pro conditione habetur, non dies certus*.

The defender, in stating his case to the Court, observed, that it resolves into the following question. When a gratuitous provision is made to an infant, payable at the age of sixteen, which is agreed to infer the condition of the child's arriving at that age; whether the addition of the time when the child will be sixteen, does alter the nature of the legacy or donation, so as, instead of a conditional to make it a pure obligation; or whether by this addition any more be intended than to ascertain the child's age, and consequently the term of payment, in case the child should be existing at that term, without any purpose, or view to alter the nature and legal import of the legacy or donation?

In examining this question, it was observed, that the application of a general rule to a particular case, is often the source of error, by omitting to consider whether the reason of the general rule be applicable to the particular case. And, however well founded this maxim may be in general, it suffers many exceptions. The following case is an example of a *dies certus* being conditional. If a sum be settled upon an infant without any valuable consideration, and be made payable to the infant himself, without interest and without mentioning heirs or executors, twenty years after the date of the obligation, at which time, by calculation, the obligee will be major; there seems to be little doubt, that this must infer the condition of the obligee's arriving at majority; for here every circumstance concurs to make it be understood a provision for behoof of the obligee solely, without any other view or purpose. And it is a rule in law, as well as in common sense, that if a deed cannot attain the end for which it was granted, a judge cannot interpose to make it effectual. The next example shall be where a *dies incertus* is not held conditional: *Pomponius*, after laying down, *l. 22. pr. quando dies legat.* that an uncertain day makes a condition; and that a legacy to *Titius*, when he shall arrive at fourteen, is therefore void if he die before that

time, *Papinian. l. 26. § 1. cod.* states the case, that a testator places out a sum in the hands of a third party, taking the debtor bound to pay the interest to an infant, and the principal itself when the infant should arrive at the age of twenty-five; and puts the question, Whether, in this case, *dies incertus habetur pro conditione*? His answer is in the negative; and justly, because the testator's intention was certainly that the heirs of the infant should have it, rather than it should remain for ever with the debtor.

These particulars are mentioned to show, that a question of this nature is not so much to be determined by critical words, as by the circumstances of the case, from which chiefly may be gathered the intention of parties. The defender is a plain countryman, who never read a word of the law of *Scotland*, not to talk of the *Roman* law, and never heard, till this process was commenced, of the maxim, *quod dies incertus pro conditione habetur, non dies certus*. But without distinguishing him by any singularity of character, let us examine what probably was the view of a man of plain sense in making such a settlement upon an infant grandson, his name-ake. He was anxious to have a provision made for this child; and, to that end, he was willing to settle 600 merks of his own means, provided the father would settle 400 merks. He could not but know, what every one knows, that this child had not an equal chance to arrive at the age of sixteen, when he might have use for the money as an apprentice-fee. Sooner he could not have use for it; because the defender in the interim was obliged, by the contract, to give him his aliment and education. Now, supposing the question had been put, What if this child die in infancy? Is there any thing in the circumstances of the case, to make any mortal presume, that the defender would have consented, in that event, to pay the sum to the father, or perhaps to people who were utter strangers to him, which happens to be the present case?

Considering the matter in this view, it would make no difference, though the term of *Whitsunday 1747* had been fixed for the performance of this obligation, without mentioning the age of sixteen: for the reason of fixing such a distant term of payment would be obvious, viz. that the child, if it lived, would be at that time sixteen years of age, at which time there might be use for the money. If so, why should the fixing a certain term of payment render the obligation pure; when, from the circumstances it must appear, that the money was set aside to answer a certain purpose and event, and that, by the predecease of the child, the event did not happen, and the purpose did not answer? But the defender has no occasion to make good a more difficult case than what he is engaged in. It is sufficient for him to say, that there are both an uncertain and a certain day named in the contract, which is a singular case, upon which our doctors have given no response, and to which the rule above laid down is not applicable. How are we to judge of this singular case,
otherwise

otherwise than by considering the concomitant circumstances, and the views of the parties, all of which speak in favour of the defender?

In general, the naming a term for payment must either be with a view to the obligee to qualify the obligation, or with a view to the obligor to give him time to prepare the money. The circumstances of the present case will not admit the latter construction, for one year was as good for that end as sixteen. Nor could it be with the view to save interest that the payment was deferred to a distant time, for the aliment, cloathing, and education of the child, must have far exceeded the interest. Now, if it was not to give time for preparing the money that the payment was deferred to so distant a term, it could not be done with any other view than to qualify the obligation, so as that it should only be payable in case the child, arriving at the age of sixteen, might have use for the money.

The same conclusion may be drawn from a different medium in law. Lord *Stair*, lib. 3. tit. 1. § 2. lays down the following doctrine: "Personal rights and obligations are sometimes incommunicable, and not assignable or transmissible, either by reason of the matter, such as most conjugal and parental obligations; or where there is a singular consideration of the persons, as in commissions, trusts, &c. Yea, generally, all obligations are intransmissible upon either part directly without consent of the other party, which is clear upon the part of the debtor, who cannot, without consent of the creditor, liberate himself and delegate his obligation upon another; neither can a creditor force his debtor to become debtor to another, unless he consent, as when he becomes obliged to pay to the creditor, or to his assignees." And our author goes on with observing, that to make obligations more useful, custom has introduced an indirect manner of transmission by a procuratory *in rem suam*. In *England*, to this day, a debtor is not bound to pay to an assignee. In our later practice, an assignation, with respect to deeds for a valuable consideration, has obtained the force and effect of *cessio in jure*; and if such a deed be so completely assignable, there can be no doubt of its descending to heirs. But still there are many obligations so personal, as not to transmit either to heirs or assignees. In the present case, the sum in question is made payable to *George Young* the infant, at the first term after he shall arrive to the age of sixteen, being *Whitsunday* 1747, without the least mention either of heirs or assignees. The question then is, What intitles either an heir or an assignee to claim, since the obligant has not consented to pay to either? It is very true, that if the obligee had survived the term of payment, the obligation must have transmitted, because the obligor ought to pay at that term, and the heir must not suffer by his delay: but when he has been guilty of no delay, upon what medium is he liable to the pursuers, when he only promised to pay personally to his grandson? His obligation was gratuitous, and he had the
power

power of giving it upon any condition, and in any terms, he thought fit.

Obligations for a valuable consideration, it is true, are always transmissible to heirs and assignees: it is the creditor in that case who purchases the obligation, and, for that reason, it ought to be regulated by his will and intention. But wherever an obligation proceeds from the free-will of the debtor, it ought never to be extended beyond the letter of the deed, unless strong circumstances can be specified to support the extension: none such can be specified in the present case; on the contrary, every circumstance speaks aloud that there should be no extension beyond the letter of the deed.

Upon the foundation of the interlocutor complained of, the obligation must have been created the moment the deed was signed, for otherwise it could not go to heirs. Upon this supposition the infant, had he lived till fourteen, might have tested upon it, and might have assigned it gratuitously. It is hard to suppose that this could be done: it is still harder to suppose, that an inhibition might have been raised upon the contract the moment it was signed; and yet, there is no evading this consequence, supposing a pure obligation to have been created transmissible to heirs and assignees.

“The Lords unanimously altered, sustained the defence, and
“affoizied.”

N^o CIII.

17th February 1749.

JAMES ANDERSON and other Burgesſes of *Wick contra* MAGISTRATES.

BURGH ROYAL. DESUETUDE.

THE town of *Wick* was erected into a royal burgh by a charter from the Crown, *anno* 1589, containing regulations for electing the magistrates and council, in the following words: “Cum speciali et plenaria potestate liberis inhabitantibus et burgenſibus dicti burghi, et ſuis ſucceſſoribus in futurum, cum expreſſo aviſamento et conſenſu dicti noſtri conſanguinei *Georgii* Comitis de *Caithnes* et ejus hæredum et ſucceſſorum, et non aliter, ſeu alio modo, præpoſitum et quatuor bailivos, dicti burghi incolas ſeu inhabitatores, una cum theſaurario, gildæ-decano, conſulibus, burgenſibus, ſerjeandis, aliisque officiariis neceſſariis, intra dictum burgum, pro gubernatione ejusdem, faciendi, eligendi, conſtituendi, et creandi, eoſque toties quoties expediens videbitur, pro cauſis rationalibus deponendi.”

Certain burgesſes of the town finding a deviation from the charter in the later practice, and new regulations eſta bliſhed by a ſet of the town made by the royal burrows *anno* 1716: and apprehending that this ſet tended to eſta bliſh a foreign intereſt within the town, brought a proceſs of declarator for aſſerting the independency

dency of their town, and for restoring their form of government to its original standard. The conclusions of the declarator are, *1mo*, In general, That the charter of erection 1589, containing regulations for electing the magistrates and town-council, ought to be found and declared the rule, and that the set made by the royal boroughs *anno* 1716 ought to be declared of no force, so far as it differs from the charter. *2do*, In particular, That no person should be intitled to elect, or be elected a magistrate or counsellor, but burgeses and inhabitants, in terms of the charter.

The answer to the *first* conclusion was, That the old form of popular elections, universal in *Scotland*, was justly altered by the act 29. parl. 1469, because of the difficulties and confusion attending such elections; an aristocratical form of election being introduced in place of the democratical, by appointing the old council to chuse the new: that the charter 1589, though granted long after the alteration, was probably made out by inadvertency in the old style: that the set 1716, by the convention of boroughs, proceeding upon the known inconveniencies of popular elections, was an alteration for the benefit of the town, no great deviation from the charter, and agreeable to the spirit of our law, as it now stands; and therefore that this set must be the rule, as the convention of boroughs are authorised to make regulations about this matter.

To the *second* conclusion, it was answered with regard to the electors, that though an honorary burges, merely *qua* such, ought not to be admitted to a vote, yet honorary burgeses who have property in the town, are intitled to be electors, both by the charter and by constant practice, though they may not be inhabitants: that these persons are also qualified to be elected, especially *Sinclair of Ulbster*, of whom the town holds most of its property, and to whom they pay a considerable feu-duty; and that country-gentlemen who have property in the town, are perhaps more interested and better qualified to promote its welfare than many of the inhabitants: that whatever reason there may be for the bailies being burgeses and inhabitants, who must constantly attend the dispensing of justice, there is no such necessity that the provost should be a burges or resider: that in fact a practice has prevailed in most of the small boroughs of the kingdom, of chusing country-gentlemen to be provosts; and that this practice is authorised by a judgment of the House of Lords, in the case of *Dumbarton*, 19th February 1735. And *lastly*, As to the counsellors, that neither the words of the charter, the practice of other boroughs, nor reason, require that they be inhabitants.

The pursuers replied to the *first*, Where a royal borough is erected without prescribing a form of government, or where the form of government is doubtful by uncertain practice, it is the province of the convention of boroughs to adjust differences, and to ascertain the form of government by a writing called a set. But the convention of boroughs have no power to alter a set prescribed by the King, more than to deprive a royal borough of any of its rights and privileges.

leges. Nor is there any pretext of an established usage or practice, past memory of man, contrary to the charter of erection. We find the popular election of magistrates was the form so late as the 1708; which no doubt continued till it was altered by the set 1716. And this alteration was not only made without any proper authority, but was really a partial and unjust deed by the convention of boroughs, founded upon a false and affected narrative of uncertainty in the form of election, brought about by the influence of the Earl of *Breadalbane*, without so much as allowing the town to be heard for its interest; and calculated to put the government of the burgh in the hands of the Earl, and of *Sinclair* of *Ulster* who derives right from him.

As to the *second* conclusion, it is extremely clear from the charter, that none have right to vote but *liberi inhabitantes et burghenses*; and that none are qualified to be of the magistracy or council, but the same *liberi inhabitantes et burghenses*. The defenders admit this so far, as that an honorary burghess is not qualified to elect or be elected; and, consistently with this admission, how they can plead for country-gentlemen, whatever property they may have in the town, if neither inhabitants nor burghesses, is what the pursuers cannot comprehend. Nay, the defenders further admit the authority of the charter to exclude any from being bailies but burghesses and inhabitants; and yet, with the same breath, they insist that a stranger may be provost, though the charter makes no distinction betwixt the qualifications of provost and bailies. And it is of no consequence what may be the custom of other boroughs, when this burgh has its privileges upon the express condition of chusing no man for provost but a burghess or inhabitant; and the same regulation is laid down with regard to all the other office-bearers, and also with regard to the counsellors.

As to the judgment of the House of Lords in the case of *Dumbarton*, the pursuers say, that that judgment is not applicable to the present case. It was a reduction of an election upon this ground, that a country-gentleman was chosen provost, who was disqualified by the statute-law of the kingdom; the election being reduced by this Court, the judgment was reversed by the House of Lords upon the following ground, that a contrary usage had prevailed so far against the statutes, as to put the town in *bona fide* to elect a stranger for a provost; and therefore that this particular election ought to be sustained, leaving the statutes to have their full force in time coming; which was really doing no more than what the Court of Session has done in this very case, by sustaining the elections of this town for the years 1745, and 1746, being in *possessorio*; reserving to the pursuers to ascertain the form of election in time coming by a declarator as accords; nor more than what they have done in many similar cases, by sustaining informal sasines and executions, upon the force of consuetude; but declaring all such informal deeds to be null in time coming, and making acts of federunt to that purpose.

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It was further observed, that the charter of erection confining the privilege of bearing office within this burgh to burgesſes and inhabitants, particularly with regard to the provost and bailies, was no ſingular regulation, but copied from the public law of the kingdom. It was an old ſore, diſtreſſful to the royal boroughs, eſpecially to the meaner ſort, that they were conſtantly laid open to their powerful neighbours, noblemen and gentlemen: who, graſping at power and profit, wanted to get the government into their own hands. An ample remedy was provided for this ſore by the act 26. parl. 1535; an effectual remedy at this day, when Judges take care to put it in execution. The act proceeds upon this narrative, “ That the royal
 “ boroughs are impoveriſhed and almoſt ruined by the diſuſe of
 “ merchandize, occaſioned by electing ſtrangers for magiſtrates,
 “ who conſume the common-good of the burgh, and aim at nothing
 “ but their own profit: therefore enacted, that no man in time com-
 “ ing be choſen provost, bailie, or alderman, but an honeſt ſubſtan-
 “ tial burgeſs, who is a merchant or indweller within the burgh.” And this ſtatute is renewed and enforced by the act 8. parl. 1609.

The only answer that can be given to the charter of erection, and to the ſtatutes ſupporting it, is, that a contrary cuſtom has prevailed through moſt of the royal boroughs in *Scotland*, and in the town of *Wick* in particular, of electing ſtrangers to be provosts. But ſuppoſing this to be the fact, which is not admitted, the purſuers can find no foundation for giving a practice, however long continued, the effect of altering or annulling that very charter upon which the being of the incorporation is founded: if it be in force as to any one particular, it muſt be totally in force. And as the inhabitants of the town of *Wick* have no power, even by conſent of the whole corporation, to alter one article of their charter of erection; no practice of theirs can have that effect, which at beſt is but an implied conſent.

And as to the ſtatutes now mentioned, the purſuers ſay, that laws touching the public police go not into deſuetude; ſome of our beſt authors are of that opinion; and the Court of Session was of that opinion in the deciſion obſerved by *Stair*, 27th *January* 1681, *Jack contra* Town of *Stirling*. But be this as it may, one thing is certain, that no contrary practice has been ſpecified to infer that the ſtatutes under conſideration are in deſuetude. And becauſe this propoſition is of conſequence to the nation in general, as well as to the purſuers in particular, the following conſiderations are ſuggeſted. There are but two ways by which a ſtatute can be abrogated; one is by a poſterior ſtatute, the other by a contrary cuſtom inconfiſtent with the ſtatute, conſented to by the whole people: for, if cuſtom have the ſame force with a ſtatute to make law, cuſtom muſt have the ſame force with a ſtatute to unmake law, or to unmake a ſtatute. When we ſay therefore that a ſtatute is in deſuetude, the meaning is,

is, that a contrary universal custom has prevailed over the statute; and so much is implied in the very term desuetude.

So far the matter is clear: the difficulty lies only in the application of the doctrine to particular cases, and in specifying such an universal contrary custom as to have the force of a new law; which will be readily sustained in some cases, and with difficulty in others. Statutes which have lost their utility by change of manners and circumstances, will very readily go into desuetude, and the allegation of a contrary practice will be readily admitted without much proof: nay, it will be presumed without proof: for example, Who is it that doubts of the following statutes being antiquated and in desuetude, viz. the act 122. parl. 1581, prohibiting horses to be kept at hard meat from the 15th May till the 15th October; the act 116. parl. 1581, obliging landed gentlemen to reside at their country-seats under a penalty; the act 84. parl. 1426, obliging all men going beyond seas to take their bills of exchange from bankers within the country; the act 144. parl. 1436, that none be found in taverns after nine at night, &c. These and such like statutes, however useful when made, have lost all their utility by change of manners and circumstances, and would be considered at present as so many idle restraints upon the liberty of the subject; and desuetude will be presumed from the nature of the thing, without necessity of any direct evidence.

But statutes that are beneficial to the lieges at present, as much as when enacted, require a very special allegation of an universal contrary custom to prove them to be in desuetude. Their utility will always be a presumption in their favour; and therefore instances, however numerous, of their being encroached upon, will be just so many instances of illegal practice. To come to particulars: there is a statute prohibiting Members of the College of Justice to purchase pleas, which certainly deserves to be in eternal observance. Let us suppose, that by the relaxation of discipline such purchases had become frequent and general; the custom no doubt might excuse from the penalty, as introducing a sort of *bona fides*: but would the Court find the statute in desuetude, upon specifying endless deviations for a considerable space of time? The Court would certainly give no such judgment; because particular instances, however numerous, can never comprehend the whole people, or the bulk of them. The Court, as in similar cases, would sustain such purchases *in præteritum*; but would declare, perhaps by an act of *federunt*, that they will put the law in execution in time coming. And they would do the same with regard to their own acts of *federunt*, prohibiting agents to be factors upon bankrupt estates, and appointing rankings to go before sales, if these salutary acts were broke in upon by any general practice to the contrary. There is a statute discharging the pulling bent growing upon sand-hills at the sea-shore. This statute can never go into desuetude; for even ten thousand instances of a practice contrary to the statute, would be considered

considered as so many transgressions deserving punishment, and not to be countenanced so far as to abrogate the law.

And this in effect comes to the same with what is said by writers upon the English law, which gives as strong an effect to custom as the laws of this or any other country do. The doctrine is laid down in the following words: "But every custom which appears to have been unreasonable in itself, as being against the good of the commonwealth, or injurious to a multitude, though beneficial to particular persons, is void; nor can any continuance of such a custom give it a sanction, or make that good which was void in its creation."

But, to prevent mistakes, the pursuers must observe, that though salutary statutes can scarce be annulled totally by disuse, they will yield to private rights established by prescription, or by immemorial possession. The statute 1455, discharging heritable offices to be granted, being introduced in favour of the crown, may certainly go into desuetude, by numberless instances of heritable offices granted contrary to the statute: for the crown, as well as a private person, may renounce a benefit introduced in its own favours, and so many repeated instances may be justly considered as a virtual renunciation. But let us suppose, that the statute was introduced for the good of the public: upon that supposition, the numberless grants of heritable offices, must be considered as so many transgressions of the public law, which will not infer that the law is in desuetude. Yet as to the particular grants made by the crown, there is little doubt but they may be secured by prescription, or by immemorial possession.

To apply these considerations to the present case, the two statutes confining the privilege of bearing the office of provost, bailie, or alderman within burgh, to merchants who dwell within the burgh, are at present as necessary to the well-being of the royal boroughs, as when they were made. And the grievance complained of in the preamble to the first of these statutes, would be as sorely felt by the boroughs at present as ever, if an universal practice were introduced and supported contrary to these statutes. All the instances then that can be specified of country gentlemen elected provosts of boroughs, were they more numerous than they are, cannot be considered in any other light, than as so many encroachments upon the public law, which can never imply any thing like an universal consent, even of the royal boroughs, to pass from the benefit of the statutes; especially as many instances that can be given, must be mixed with more frequent instances of burgesses being chosen provosts, &c.

But there is more to be said against the relevancy of such instances. Supposing a stranger is chosen provost without opposition, and consequently with the presumed consent of the whole community; this instance, and many such, do really prove no more, but that the burgh, upon some view of benefit from the person elected provost, has been willing to dispense with its privilege upon that occasion. And the dispensing with a privilege upon particular occasions, will

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never infer a passing from the privilege altogether; for it is inherent in the very nature of a privilege, that it may be exercised or forborn at the pleasure of the party privileged. And as the instances are few, of reducing an election of magistrates because a stranger is chosen provost, this is legal evidence that the bulk of the instances where strangers are elected provosts, must have been by consent of the whole community; which proves just nothing at all. Such instances cannot bar that burgh, nor any other burgh, from exerting their privilege afterward, of being governed by their own inhabitants as magistrates.

Thus then the case stands. Instances of strangers being chosen provosts of burghs by consent of the whole community, however numerous, cannot, in the nature of the thing, bar a burgh, or any single burgh within burgh, from exerting the privilege in any future election, by objecting to the nomination of a stranger to be provost; and if the objection be once made and brought before this Court, it ought to be sustained. But, at the worst, supposing these instances to be considered as a sort of custom established contrary to the law; yet such custom ought never to have any weight, except as to by-gones. If the effect be given to it, of supporting a stranger provost for the year of his election upon a *bona fides* acquired by custom, this is the utmost effect that ought to be given it. But then, as such custom can have no effect *ad futura*, it can never stand in the way of a declarator tending to regulate the elections in time coming.

And what strongly supports the declarator is, that there can be no *jus quasitum* to any single person to entitle him to stand up in opposition to it. *Ulbster*, for example, though he and his father have been frequently chosen provosts of this burgh, and have always had the interest, by virtue of the set 1716, to obtain themselves, or their minions, to be chosen provost; yet this same gentleman has acquired no privilege, whether by prescription or otherwise, to be perpetual provost or dictator of this burgh: whatever illegal interest he may have, he has certainly no legal interest to oppose this declarator, more than any other gentleman in *Scotland*.

“ Found, That in the election of a provost and bailies, resident
 “ burghesses, and heritors being also burghesses, though not resident, have a right as electors, and none others. Found, That
 “ none but those who are resident, can be elected bailies; but
 “ that it is not necessary the provost, or any of the counsellors,
 “ should be resident burghesses.”

N. B. The judgment concerning the counsellors proceeded upon this ground, that there is no law requiring the counsellors to be inhabitants.

N^o CIV.

17th February 1749.

Earl of CAITHNESS *contra* SINCLAIR of Ulbster.

PERSONAL and TRANSMISSIBLE.

THE town of *Wick* was erected into a royal burgh, by a charter from the crown, *anno* 1589, containing regulations for electing the magistrates and council, in the following words, “Cum speciali
 “et plenaria potestate liberis inhabitantibus et burgenfibus dicti
 “burgi, et fuis fuccefforibus in futurum, cum expreffo avifamento
 “et confenfu dicti noftri confanguinei Georgii comitis de Caith-
 “nefs, et ejus hæredum et fuccefforum, et non aliter feu alio modo,
 “præpofitum et quatuor balivos, dicti burgi incolas, feu inhabita-
 “tores, una cum thefaurario, gildæ decano, confulibus, burgenfi-
 “bus, ferjeandis, aliifque, officiariis neceffariis intra dictum burghum,
 “pro gubernatione ejufdem, faciendi, eligendi, conftituendi et cre-
 “andi, eofque, toties quoties expediens videbitur, pro caufis rationa-
 “libus, deponendi.”

This privilege of fuperintending the elections of the town of *Wick*, was adjudged from the family of *Caithnefs* with the land eftate; and firft, the Earl of *Breadalbane*, and thereafter *Sinclair* of *Ulbfter* in the Earl’s right, got into poffeffion of this privilege, during the time that the affairs of the family of *Caithnefs* were in diforder. A declarator, at the inftance of fome of the burgefles of the town, to regulate their elections according to the form prefcribed in the faid charter, furnifhed the prefent Earl of *Caithnefs* an opportunity to appear for his intereft, and to difpute *Ulbfter*’s right to this privilege. He contended, That it is purely perfonal, and not alienable more than his peerage, whether by a voluntary or judicial deed: the privileges attending peerage, a feat in parliament, and exemption from perfonal execution, are not alienable: a right of burgefship is not alienable, nor the privileges of a royal borough: the Eaft India Company cannot alienate their privileges, nor any other company erected with exclusive privileges. The reafon is the fame in all, that thefe privileges are perfonal, and for that very reafon not alienable; yet fome of the privileges mentioned are attended with pecuniary advantages, which the privilege under confideration neither is nor can be. 2^{do}, The Earl of *Caithnefs* can exercife this privilege in the ftate of apparen- cy; it does not fubject the heir to the paffive title, more than affuming the dignity, or bearing the family arms. It is therefore not patrimonial, to be carried by adjudication.

Answered for *Sinclair* of *Ulbfter*. By the conftitution of our law originally, many things were exempted from commerce, heritable offices, jurisdictions, and even land itfelf, though the moft natural fubject of commerce. But now we lean to the other fide, that all rights are alienable, unlefs the contrary be fpecified in the grant.

It is indisputable, that personal privileges conceived to heirs and assignees are alienable; which is the present case, because this privilege is given to the Earl of *Caithness*, his heirs and successors: and when a patronage, an heritable office, an heritable jurisdiction, are alienable, there can be little doubt that the privilege under consideration is also alienable.

“ The Lords first found this privilege not alienable; thereafter, “ that it is alienable.”

N^o CV.

24th February 1749.

Competition HEW CRAWFURD Clerk to the Signet, and the NEW BANK.

M O N E Y.

HEW CRAWFURD clerk to the Signet, wanting to transmit L. 20 Sterling to *William Lang* merchant in *Glasgow*, inclosed in a letter an Old Bank note for that sum, which was sent by post; and for security, Mr *Crawfurd* not only took a note of the number, but also wrote his name upon the back thereof. This letter being lost by some accident, an advertisement was forthwith put in the newspapers, that the note was amissing, describing the sum, number, and all other particulars. The note at last appeared in the hands of the New Bank, and Mr *Crawfurd* raised a multiple-pounding in the name of the Old Bank. The New Bank admitting, that the note might have been stolen, insisted that they were *bona fide* purchasers; and that such is the nature of money and of bank-notes, which serve the purpose of money, that a *bona fide* purchaser, or possessor, is not subjected to a *rei vindicatio*, because such a claim would be an impediment to commerce.

Answered for Mr *Crawfurd*; bank-notes have no privilege by the law of *Scotland* above bills of exchange, other than that they are taken payable to the bearer, which makes them pass from hand to hand without necessity of indorsation; but which, at the same time, gives them no other privilege than what belongs to every sort of moveable. The bare possession of a bank-note, without consent of the proprietor, will no more transfer the property than the bare possession of a table or of a chair. Possession indeed presumes the consent of the former proprietor: but then this, like other presumptions, must yield to positive proof; and therefore, if the person who vindicates, proves his property, *et quomodo desit possidere*, so as to take off the presumption arising from possession, he must prevail. And the present case is precisely similar to that of a blank bond while that deed was in fashion: possession of a blank bond presumed property; but no mortal ever doubted that the true creditor had access to vindicate the same, if he could prove *quomodo desit*

desiit possidere. Nay, further, even current coin has not this privilege: it is true, that if a guinea be stolen, the proprietor cannot vindicate the same, unless he be able to prove his property, *et quomodo desiit possidere*, which can seldom happen; but here *non deficit jus, sed probatio.* And this matter cannot be better explained than in the words of *Javolenus*, l. 78. *Solution.* “ Si alieni nummi inscio vel in-
“ vito domino soluti sunt, manent ejus cujus fuerunt. Si mixti es-
“ sent, ita ut discerni non possent, ejus fieri qui accepit, in libris *Gaii*
“ scriptum est: ita ut actio domino, cum eo qui dedisset, furti com-
“ peteret.”

Replied, If money or bank-notes were, like other moveables, subject to a *rei vindicatio*, the commerce of money or bank-notes would be more dangerous than of other moveables: if a man purchase a horse, or a flock of sheep, he has the warrantice of the vender to rely on: but money or bank-notes cannot be traced; for a man may have plenty of both without being able to say from what hand any one guinea or bank-note came. For this reason, as money and bank-notes are the great vehicles of commerce, it is universally received in practice, that the circulation of money and of bank-notes should be absolutely free, by denying a *rei vindicatio*. So far strict law yields to the favour of commerce; nor is it attended with great hardship to any person, considering how much easier it is to preserve money and bank-notes from theft, than almost any other sort of moveables.

“ The Judges were unanimous in two points: That money is not
“ subject to any *vitium reale*; and that it cannot be vindicated
“ from the *bona fide* possessor, however clear the proof of the
“ theft may be. *2do*, That bank-notes serving the purposes of
“ money, must be entitled to the same privileges. And there-
“ fore, that Mr *Crawford* had no claim to the note in ques-
“ tion.”

N^o CVI.

8th June 1749.

Count LESLIE *contra* Lady FORBES.

F O R E I G N E R.

THE succession to the estate of *Balquhain* being open by the death of *Ernest Leslie*, who died without heirs of his body, Count *Antonius Leslie* was preferred as heir of entail. And he, after getting into possession, having brought a reduction of a deed of alienation of part of the entailed estate made by *Ernest*, was opposed by the defenders with the following objection to his title, That he was a German born, and incapable, as being an alien, to hold lands in *Scotland*, or to pursue any action depending upon the property of land. To support this objection, the defenders appealed to the *Roman law*,

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and that of all modern nations, the English in particular. And to show that our law is the same, letters of denization were mentioned, of which great numbers are upon record; some of them bearing the following express clause, "Non obstante quod extraneus existit, et quod bona mobilia et immobilia quorumcunque extraneorum, infra regnum nostrum decedentium, ad nostram dispositionem pertinent."

It was answered for the pursuer, That there is nothing in the feudal law to bar an alien from succeeding to land in *Scotland*; even though the alien should enjoy a feu in his own country: nothing more common than the same man holding feus of different superiors; and, which is more, nothing more common than to find one sovereign prince holding a feu of another. The laws which bar foreigners from holding land, are altogether political; and accordingly we find them very different in different countries: in *Germany* and *Italy* no foreigner can hold land, whether by succession or purchase: the princes there are jealous of having subjects more addicted to a foreign prince by nativity, than to them by vassalage: in *France*, a powerful kingdom, and consequently less jealous of private enemies, a different political rule prevails: foreigners are allowed to purchase in *France*; but they neither have the power of making testaments, nor do their heirs succeed to them either in land or in moveables: the king is legal heir to all strangers. In *Scotland*, no law nor instance can be given of foreigners being prohibited to acquire land or to succeed; though from the customs of other nations the point has been doubted of by our lawyers: and it would require a very express law, or a very precise custom, to exclude the succession of foreigners. It is no hardship to debar them from acquiring; but it would need a very strong argument from utility to overbalance natural justice, by depriving an innocent man of his birth-right.

But whatever might be the opinion of lawyers in ancient times, all the political considerations that introduced this custom are now at an end. It might be proper to exclude foreigners from succeeding to land, while war was carried on by military vassals: and while there was little commerce among nations, there was little inconvenience felt. But now that commerce is become universal, and war carried on in a different manner, this constitution has run pretty universally into desuetude. And if ever it was doubted in *Scotland*, there ought to be no doubt now, that foreigners may succeed.

As for letters of denization empowering foreigners to succeed, the most that can be made of these, is, that the matter has been called in doubt: and they scarce amount to so much; for in many of these letters a privilege is granted to foreigners to dispose of their moveables at their death; and yet that foreigners always enjoyed this privilege, was never doubted. But the case of all such grants is this: the letters were at any rate necessary to entitle foreigners to enjoy offices and dignities, and to entitle them to remain in the kingdom, which strangers may be expelled from at pleasure: and it was

was natural to throw in every privilege, whether competent to them before or not.

A hearing in prefence being appointed, the pleadings took up three days. The Judges at last pronounced their opinion unanimously, That an alien or foreigner cannot succeed to land in *Scotland*; and therefore, that the pursuer Count *Leslie* cannot insist in the present action. The many acts of naturalization of foreigners inclined them to be of opinion, that our practice did not differ from that of other countries. But what principally moved them was, the law of *England*, and the Union. The *English* are jealous of communicating their privileges to foreigners, who are incapable to succeed to land in *England*: and it was thought hard, that by the Union a door should be opened to foreigners, which is shut against them by the laws of *England*. But it may be doubted whether this argument be solid. A stranger purchasing, or succeeding to an estate here, must be the King's subject *qua* vassal: but his holding that estate does not entitle him to all the privileges of a native; it entitles him only to the privileges consequent upon his property, such as holding courts, or levying rents: it entitles him not to be a member of parliament, nor to vote for a member of parliament; nor in general to any privilege which may be called personal, though limited to those who possess land.

N^o CVII.

21st June, 1749.

BELL of *Whitestonehill* contra CARRUTHERS of *Dormont*.

REPRESENTATION.

WILLIAM BELL of *Winterhope-head* having two daughters, and no prospect of more issue, settled his estate, in his eldest daughter *Mary*'s contract of marriage, with *John Carruthers* of *Dormont*, upon the heirs-male of the marriage. And in the same contract he made a settlement upon his other daughter *Jean*, in the following words: "Likeas, it is hereby expressly provided and declared, that
 " this present disposition, procuratory of resignation, precept of sale,
 " fine, and infeftment to follow hereupon, are made and granted by
 " the said *William Bell*, and accepted of by the said *John Carruthers*,
 " under the burden and payment to *Jean Bell*, second lawful daughter
 " to *William Bell*, of the sum of 4000 merks, at her attaining the
 " age of twenty-one years complete, with annualrent from the term
 " next after *William Bell*'s decease: declaring, that in case *Jean Bell*
 " depart this life before she be twenty-one years complete, or before
 " her lawful marriage, or die thereafter not having children, or leave
 " children who shall not attain the age of one year, that in these
 " cases her portion shall pertain and belong to the said *John Carruthers*
 " and *Mary Bell*, and their heirs of tailzie above mentioned."

John

John Bell of *Whitestonhill* intermarried with the said *Jean Bell*, and had issue a daughter, who survived her mother, attained to six years of age, and was served and retoured heir of provision to her mother. After her death, her father expedite a general service as heir of line to her, and commenced process against *Francis Carruthers* of *Dormont*, as representing his father *John*, for payment of the 4000 merks. The defence was, That the sum in question being settled upon *Jean Bell* without any mention of heirs, it must be carried by a service as heir of line, and not by a service as heir of provision; and therefore that the service of *Jean's* daughter, as heir of provision to her mother, being void, the portion remains still *in hæreditate jacente* of the mother, to be taken up by the defender as heir of line. On this head it was observed for the defender, that as a service *qua* heir in general cannot carry personal rights descendible to heirs of provision, though the heir of line be by the provision called to the succession; so a service as heir of provision cannot carry subjects descendible to heirs of line. To prove which, the decision *Edgar contra Maxwell* of *Barncleugh* was appealed to, 21st July 1738.

The pursuer, to make his answer to this objection the better understood, set forth the words of the service. “ Qui jurati dicunt, “ quod demortua *Jeana Bell* filia legitima secunda quond. *Gulielmi Bell* in *Winterhopehead*, mater *Jeanae* unicæ filiæ procreat. inter illam “ et *Joannem Bell* latoris præsentium, obiit ad fidem et pacem S. “ D. N. et quod dicta *Jeana Bell* est legitima et propinquior hæres “ provisionis dictæ suæ matris, secundum tenorem contractus matrimonialis init. et perfect. inter *Joannem Carruthers*, unicum filium “ et hæredem *Joannis Carruthers* de *Dormont*, cum consensu sui patris, “ ex una parte, et *Mariam Bell* filiam natu maximam dicti quondam *Gulielmi Bell* de *Winterhopehead*, et illum pro illa in se onus “ suscipien. ex altera parte, de data decimo die *Augusti* 1708: per “ quem quidem contractum matrimonialem dictus *Joannes Carruthers* “ junior, et respectivi hæredes talliæ inibi mentionat. onerantur “ cum solutione quatuor mille mercarum monetæ *Scotiæ*, dictæ de “ mortuæ *Jeanae Bell*, et puerulis ex ipsius corpore legitime procreat. “ matri superviventibus, et ad unum annum pervenientibus; quibus deficien. aliis hæredibus in dict. contractu specificatis; ut in “ dicto contractu matrimoniali, diversas alias clausulas in se continen. latius proportat; et quod dicta *Jeana Bell* est legitimæ ætatis. “ In cujus rei test. &c.” To clear the point in issue, a distinction was stated betwixt a general service in which one specific subject only is claimed, and a general service in which no subject is mentioned. With regard to the latter, it is necessary that the general service specify the precise title under which the party claims, because a service has a passive effect as well as an active; and if it should be found that the service carries more than is claimed, the consequence might be, that the claimant should be liable to the predecessor's debts, beyond what he proposes to be. For example, supposing a person who is both heir of line and heir-male, claims as heir-

heir-male only, if the Court shall find he has right by this service to subjects descendible to the heir of line, the necessary consequence must be, to subject him to his predecessor's debts as heir of line; which would be unjust, since it would be subjecting a man as heir of line to his predecessor's debts, who never intended to be so subjected: and a more precise declaration he cannot give of his intention, than to claim only as heir-male, when he hath both titles in his person. This is a doctrine established by many decisions; and particularly that mentioned by the defender, where it was found, that a service as heir-male in general carries not a provision in a contract of marriage to the heirs-male of the marriage, though both characters concur in the person served.

It is a very different case, where one specific subject only is claimed in a general service. There it is of no importance under what character the claimant be described, provided only he be intitled to take that subject by a service. There can be no danger in finding him intitled to it; because, in claiming that specific subject, the heir served must lay his account to be subjected to all the burdens consequent upon that claim. However wrong described *Jean Bell* may be in the service, it is evident she intended to assume the proper character which intitled her to claim the 4000 merks: and she or her tutors must have laid their account that she should be *passive* liable to all debts which could affect her in quality of heir to that subject: therefore it can have no bad consequences, like what follow in the former case, to find her intitled to this subject; because such judgment will not subject her to any debts but what she submitted to. The present objection then amounts to no more but this, that here is a *falsa demonstratio*, a mistake in the description of the heir: to which the obvious answer is, that a *falsa demonstratio* is nothing, *si constat de persona*. The claimant's intention is clear to serve heir to this subject; and it is of no importance how she be described, provided it appear from the service that she is intitled to the subject. To lay any weight upon an erroneous designation in such a case, is to make justice, the substance, yield to form, the shadow.

It was added, that a general service is but a late invention. Within these two centuries, an heir needed no active title to such subjects as are now carried by a general service: it was sufficient that he claimed them, or brought a process: any act asserting his right was sufficient to vest. And while our law stood so, the heir run no hazard of being subjected farther to the debts of his predecessor, than in the character which he assumed. The general service was introduced by analogy of the *Roman* law, as an *aditio hæreditatis*: and therefore, if in the general service it be clear what subject is claimed, the service must be effectual as an *aditio hæreditatis*. The subject claimed, whether as at present by a service, or as formerly without a service, must regulate the whole. There will be no active title but to the subject claimed: and there will be no passive title but what results from claiming that subject.

The Lords unanimously repelled the objection against the service. They were of opinion, that the decision, *Edgar contra Maxwell*, is not applicable to the present case, where the subject is mentioned in the service, which clearly points out the intention, and makes the appellation of heir of provision to be merely a *falsa demonstratio*.

N^o CVIII.

2d June 1749.

Doct^r OLIVER COLT *contra* BARBARA ANGUS.

W R I T.

THE incorporation of fleshers and candlemakers in *Canongate* being indebted by bond 1000 merks to *Margaret Smart* and her children, did, to obtain a delay of payment, grant a bond of corroboration, in which *Robert Angus* was one of the obligants, who was not an obligant in the original bond. The words of the bond of corroboration are what follow, “ And seeing the foresaid principal sum of 1000 merks, and interest thereof since the term of “ *Martinmas* last 1742, is still justly resting unpaid; and that the “ said *Margaret Smart* and her children are willing to supersede payment thereof until the term of payment under-written, under “ our granting the corroborative security after-mentioned: therefore we the present, deacon, box-master, and remanent members “ of the said incorporation particularly above-named, in farther “ corroboration and fortification of the foresaid bond and sums “ therein contained, and without prejudice thereto in any sort, “ *sed accumulando jura juribus*, bind and oblige us conjunctly and severally, our heirs, executors, successors, and intromitters with our “ goods and gear whatsoever, and also our successors in office, as “ also the proper means and effects of the said incorporation, to “ content, pay, and again deliver to the said *Margaret Smart* in life-rent, and to *Smart, Janet*, and *Jean Tenents*, only children now in “ life procreate betwixt the said *Andrew Tenent* and *Agnes Smart*, equally amongst them; and failing of any of them by decease, to the “ survivors, their heirs or assignees, in fee; and that at and against “ the term of *Whitsunday* next to come in the year 1744, without “ longer delay, with 200 merks money foresaid of penalty in case “ of failzie, together also with the due and ordinary annual rent of “ the said principal sum, from and since the foresaid term of *Martinmas* last to the foresaid term of payment, and yearly, termly, “ and proportionally thereafter, during the not payment.”

Barbara Angus being sued for payment as representing her father *Robert*, made this defence, that the obligatory part of the bond does not contain any sum; and therefore, that no action could lie upon this

this bond against *Robert Angus*, who is not taken bound to pay any sum. It was answered, that though no sum is mentioned in the obligatory clause of the bond, which is plainly an oversight of the writer, yet no doubt is left about the sum being evidently the same sum that is contained in the original bond, as is implied in the very nature of a bond of corroboration. The Lord Ordinary first, and then the whole Court, repelled the objection to the bond of corroboration, and decerned against the defender conform to the conclusion of the libel. In a reclaiming petition for the defender, the following topics were insisted on. When writing was first introduced in law-matters, it was made use of as evidence only, or as a private minute of acts and deeds passing among parties. Sir *Henry Spelman* the learned antiquary, speaking of charters and infeftments, observes, "That in times past, deeds were but notes, or subsequent remembrances of the livery precedent, and of the witnesses to the same." And this is evident from the style of charters, which, to this day, run in the preterite tense, *dedisse, concessisse, &c.* The same was the style of bonds, though, for a reason that shall be mentioned, they are commonly now made to run in the present tense.

In the course of time as writing became more common, and was found a more commodious sort of evidence than that of witnesses, writing came to be considered as an essential solemnity to many deeds; particularly to every transaction about land, grants thereof, conveyances, *fasines, &c.*

With regard to personal obligations, tho' writ may not be essential, yet it is an established rule, that wherever they are agreed to be reduced into writing, there is no legal obligation till the writing be completed in due form of law. However direct the verbal engagement may be, the law affords no action: there is still *locus pœnitentiae* till the writing be perfected.

From this there arises another rule, that if an obligation, or other deed, be reduced into writing, the writing is the only thing that is considered, whether in point of evidence or of obligation. If the writing be formal, process is sustained upon it; if informal, the pursuer will not be allowed to prove an antecedent agreement by witnesses, or even by oath of party; for this evident reason, that the agreement being *de facto* reduced into writing is legal evidence, that there was to be no binding obligation but by writ; and therefore, that no verbal agreement, supposing it to be proved, can be obligatory.

Hence it is, that wherever an agreement is reduced into writing, such writing is now considered as the binding act or deed of the party. His consent is understood to be interposed by the act of subscribing the paper: it is this act which forms the obligation, just as much as the emission of words in a verbal bargain; so that a bond, strictly speaking, is *literarum obligatio*. It does not derive its effect from any antecedent agreement, but merely from the subscription and consequent delivery, where delivery is necessary.

Thus

Thus, with regard to a bond of cautionry, the granter must have agreed verbally to become cautioner, without which there could be no occasion to write the bond: but then this antecedent consent is not what binds him; for, even after the bond is subscribed, he may draw back at any time before actual delivery. And accordingly the style of bonds presently in use, is adapted to the sense of the law. The preterite tense is universally in disuse: The obligatory clause is always put in the present tense, as in the bond of corroboration now under consideration; "Therefore, we the present deacon, boxmaster, &c. in further corroboration, &c. bind "and oblige us conjunctly and severally, &c."

And this in an especial manner is true as to bonds containing a clause of registration, which are in the strictest sense *literarum obligationes*, deriving their whole force and effect from the subscriptions of the parties. And so true this is, that such bonds have an effect which no verbal obligation can have. *1mo*, They not only constitute the essence of the obligation, but at the same time are complete evidence of the nature of the obligation. These are said by the *English* lawyers to prove themselves, and to admit no averment against the truth of them. *2do*, By registration, execution and legal diligence directly follow, without the necessity of any intermediate process.

Taking now the bond of corroboration, which is made the foundation of this process, as a *literarum obligatio*, it is not seen how action can be sustained upon it. It is not sufficient to constitute an obligation that a man becomes bound to pay: such a vague and undetermined obligation is good for nothing. He must further become bound to pay a certain sum, without which no execution can pass upon the bond, nor a process be sustained upon it. It is true, the party subscribed the bond, and that subscription is a consent to pay and perform whatever is expressed in the bond: but, as it is not expressed what sum he shall pay, this in effect is no obligation; in a word, as the obligation depends entirely upon the bond, the Court must take it as it stands, and can neither grant execution, nor sustain process but in the very terms of the bond.

And this will afford a ready answer to the only argument insisted on by the pursuer in support of it, which is, "That as a bond "of corroboration was *de facto* granted, it is extremely clear from "the bond itself, that the sum contained in the original bond, "which is declared to be resting owing, was the precise sum intended to be corroborated." It is probable the thing was so intended, though far from being certain, because the intention might have been to corroborate only a part, or to corroborate by accumulating the principal sum and bygone annualrents into a capital. But however this be, the plain answer is, that intention is not sufficient to supply the defect of the bond. It is no better than collateral evidence by witnesses, or perhaps by letters passing betwixt the parties, signifying what was *actum et tractatum*. Nothing antecedent
nor

nor even concomitant to the bond, can be brought in evidence to supply any essential in the bond. It is a *literarum obligatio*; Robert Angus was not bound, if he was not bound by the bond itself; the intention of parties is nothing in cases of this kind, where the rule is *quod voluit non fecit*.

The law is different in questions about limiting the effect of a writ from presumed will or intention; and the reason of the difference is this. In every deed to which writing is essential, two things must concur to create a right; first, the will of the granter; and next, a writ expressing that will. Therefore a clause, however express, gives no right if the granter's intention be different: as on the other hand, however clear the granter's intention may be, it will not avail in cases where writ is essential, unless it be expressed. For this reason, a grant, tho' absolutely expressed and without any condition, may, from the presumed will of the granter, be restricted as to its extent, as to the time of its taking place, and as to conditions implied. But where a clause is expressed short of what must be presumed to be the will of the parties, there can be no latitude to extend the clause beyond what is expressed; which would be giving an action without writ, where writ is essential. All that can be said is, that *quod voluit non fecit*. This is the reason why the Court never supplies any defects in charters or in sasines; and the very same reason is applicable to all deeds that require writing as an essential solemnity.

And hence clearly appears the foundation of the statute 1681, and of many decisions upon that statute. By the statute the writer must be designed, and the witnesses must be designed and also adhibit their subscriptions. These formalities are required under the certification of nullity; and the Court strictly adheres to the certification, by declaring every bond null and void which is defective in the minutest of these solemnities. Now, if this practice were taken up upon the footing of evidence only, it would be hard to say, why a bond should be reckoned no sort of evidence of a debt, because by inadvertence it happens to want the designation of one of the witnesses; for, supposing the evidence less complete upon that account, still there might be place for supplying that defect by collateral evidence, perhaps of the most pregnant sort. But taking the matter upon its just footing, that a bond is *literarum obligatio*, constituting the essence of the obligation, the reason of the statute and of the decisions comes out clear and conspicuous. The want of any solemnity required in the execution of such a deed, is an intrinsic nullity: the objection against the bond amounts to this, that the bond is imperfect, that it is not a *literarum obligatio*; and therefore that no action can be sustained upon it, more than if it were not subscribed by the party. Yet, according to the pursuer's pleading, such a bond should be effectual; for, notwithstanding its wanting the designation of a witness, which must have been by inadvertence, the intention of the parties may be extremely clear.

If the Court be in use to deny action upon bonds where the most trifling solemnity is wanting, how is it consistent with this practice to sustain action upon the present bond, where the most essential solemnity is wanting, *viz.* the sum which the subscribers of the bond are to pay? It is not sufficient that the will of the parties may be gathered from collateral circumstances, even supposing these collateral circumstances to be expressed in the bond itself. The intention of parties is nothing where the question is about a *literarum obligatio*: it is confessedly so as to a bond defective in the meanest solemnity, and the argument concludes *a fortiori* to the more essential solemnities.

This chain of reasoning may be brought within narrow bounds. Writing is essential not only with regard to land-rights, but also with regard to every promise and contract which is agreed to be reduced into writing. Such writing is not singly considered as evidence, but truly constitutes the essence of the obligation to be strictly what is called in the *Roman law* a *literarum obligatio*. Such *literarum obligatio* must be perfect in all its parts, otherways action ought not to be sustained upon it. A defect in the smallest solemnity unhinges it from being a *literarum obligatio*; and a defect in the more essential solemnities must have the same effect. The intention of parties, however clear, can never be sufficient to supply such defects, because the intention of parties cannot make a *literarum obligatio*.

The Lords altered, and found the bond of corroboration null.

N^o CIX.

19th July 1748.

SHERIFF-CLERKS *contra* COMMISSARIES.

JURISDICTION.

IN a ranking of *Cameron's* creditors, *anno* 1737, it being objected against an adjudication that it was null, as founded upon a bond above L. 40 Scots recorded in the commissary court-books; the Lords found the commissaries books not a competent register for bonds or bills above the sum of L. 40 Scots, unless where there is a consent of the parties to registrate in these books; and declared they would make an act of federunt to certiorate the lieges of the incompetency of such registrations. But the commissaries being heard against this intended act, the matter lay over. Some of the sheriff-clerks, encouraged by the foregoing proceedings of the Court, applied, July 1748, to have an act of federunt as aforesaid. This produced a hearing in presence, in which it was clearly made out that the commissary-books are a competent register for bonds, bills, &c. without limitation of sums. And the reasoning which brought over the Court to this opinion was as follows:

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In this island, it was an early practice for judges to interpose in intricate cases, by pressing an agreement betwixt the litigants; and we have instances of this practice in the Court of Session, not a few within a century. This practice brought about many agreements, which were always recorded in the judges books. The record was compleat evidence of the fact; and if either party broke the concord or agreement, execution was issued by the Court against him, without necessity of any intermediate process; see *Glanvil*, l. 8. c. 1, 2, 3, &c. The singular advantages of a concord or agreement thus finished in face of Court, were soon understood, and led men to make all their agreements of any importance in that manner, which at the same time was the more necessary before the art of writing came to be common.

From this practice sprung the deed termed in *England* a bond in judgment, and with us a bond containing a clause of registration. When by population bargains were multiplied, it became cumbersome to have recourse to a court for recording every private bargain: the art of writing becoming more common, a contrivance was fallen upon to put the agreement in writing, and to grant a mandate to a procurator to appear in judgment, in order to have the writ recorded as the agreement of the parties; which was only done in case there was a necessity for legal execution. The writing so recorded was held to be full evidence of the agreement, sufficient to found a decree; and, in consequence of the decree, execution. The authority of the mandate was not called in question, being joined with the averment of the procurator: and from the nature of the thing, if faith be at all given to writ, the mind must at last rest somewhere without requiring farther evidence. For example, a bond is fortified by the subscription of the party, and the party's subscription by that of the witnesses; but the subscription of the witnesses must be relied on without further support, otherwise evidence must be required *in infinitum*. And, for the same reason, it is neither natural nor reasonable, that the procurator's mandate, being a relative deed, should require any further support than the subscription of the party.

The style of this mandate came to be improved and made to serve a double purpose; both to be an authority for recording the writ as compleat evidence of the private agreement, and also to be an authority to the procurator to confess judgment against the party, upon which a decree passes of course to be the foundation of execution. The mandate was originally contained in a separate writing, which is the practice of *England* to this day. In *Scotland* the practice first crept in of indorsing it upon the bond, and afterward of engrossing it in the bond itself, which is our present form.

Before entering upon the question, what courts are competent for recording private agreements, and for pronouncing decrees upon them; we must take a cursory view of the jurisdiction of the ecclesiastical courts with regard to this matter. And it is admitted, that

a consistorial court, in place of which the commissary-court came, had not originally any jurisdiction in civil causes. Custom, however, and statutes, have made ecclesiastical courts competent to many causes which are not strictly ecclesiastical, but of a mixed nature, if not purely civil. With regard to actions of debt in particular, they had no radical jurisdiction: but as by the old law of *Scotland*, as well as by the law of *England*, old and new, a defender was not bound to give evidence against himself; there was no remedy, when money was lent upon faith and promise without writ or witness, but to apply to the spiritual court, complaining of breach of faith and promise. The party, though not bound to depone in a civil court, was bound in the spiritual court, for removing the scandal, to declare the truth as in the presence of God, which was in effect an oath. If he confessed, penance and restitution were enjoined: if he refused to answer, excommunication followed: and, in both cases, very rigorous execution issued against him.

Not only was the jurisdiction of the spiritual court established with regard to actions of debt referred to oath, but also with regard to all contracts that the party or parties had sworn to perform. This practice of interposing an oath for the greater security of performance, was once common; and we have traces of it so late as the act 19. parl. 1681, discharging such oaths to be taken from minors. The *juramenti interpositio* was reckoned a sufficient foundation for the spiritual court to judge in all matters arising from deeds ratified upon oath. And with regard to this, as well as the preceding case, of a claim being referred to oath, the *Reg. Maj. l. 3. cap. 7.* is full evidence.

Thus it was that the spiritual court obtained a jurisdiction in all actions of debt referred to oath, and, by analogy, in all matters whatever where the proof was to be by oath of party; a necessary jurisdiction to supply the defect of the common law. And the consequence is evident, that it was a proper jurisdiction for recording of private agreements, and for registering of bonds, &c. perhaps the most proper: for it would be absurd to deny that court the privilege of receiving the evidence of a bargain before hand, by the acknowledgment of the parties, when it has the privilege of forcing an acknowledgment by oath, after process is raised for performance of the bargain. And accordingly, we find from our oldest records, that the official and commissary courts were more frequented for registrations than any other inferior court whatever.

After the authority of the *Roman* law came to prevail, by which a defender is bound to depone against himself in civil causes, and can be held as confessed, it was thought convenient to limit the jurisdiction of the spiritual courts with regard to actions of debt, as less necessary than formerly. And *1mo*, As to the actions of widows, pupils, and poor persons, not exceeding the sum of L. 20 Scots, they are declared to have a necessary jurisdiction, the same that is competent to any other court. *2do*, Their jurisdiction as to actions of debt,

debt, and other causes referred to oath, is limited to L. 40 Scots. But *3th*, Their jurisdiction is preserved in its former extent with regard to all transactions ratified upon oath, and in all causes where the parties submit themselves to their jurisdiction; of which last, more afterward. These particulars are all distinctly set forth in the instructions to the commissaries 1563, and such remains their jurisdiction *in foro contentioso* to this day.

But as to the voluntary jurisdiction of this court, particularly as to the recording contracts and pronouncing decrees of registration, no alteration was made nor intended. By these instructions 1563, it is declared, "To be leisome to the commissaries to cause their clerks register contracts, obligations, &c. in their books, which being registered, and their decret of authority interponed there- to, the Lords of Council to give out letters in the four forms of poinding, for fulfilling the same as was wont to be given upon persons who of before lay 40 days under cursing." And as these instructions, as well as Queen Mary's charter erecting the commissary-court of *Edinburgh*, and bestowing upon it the same power of registration, are ratified by the 25th unprinted act, parl. 1592, this branch of the jurisdiction is as well established as any jurisdiction can possibly be, supposing it even to be created by this act and by the instructions; which at the same time is not the case, but barely a continuance of the jurisdiction that the spiritual court formerly possessed.

And as to the clause adjoined both in the charter and instructions, "Providing that the contract, obligation, or other writing, in the body thereof before the registration of the same, bear, that they are content the same be registered in the said books," which the sheriff-clerks are willing to lay great stress upon; the argument drawn by them from this clause comes to be just nothing at all, when the practice at that time is known. At that period the established practice was, to name in the bond every court where the bond might be registered in order to execution; the general clause of registering in all judges books competent not being known for near a century thereafter. At the time of these instructions a bond could not be registered even in the books of session, unless expressly consented to in the bond. It need be no surprise then, that the privilege of registering bonds was given to the commissaries upon condition of a consent to register in their books, when no court whatever had that privilege except upon the same condition. In a word, it is plain, that this clause is not meant to be taxative, but merely descriptive of the common practice, by mentioning a *proviso* not peculiar to the commissaries, but common to them with all the other courts in *Scotland* at that time.

It is then clear, that the commissaries once enjoyed this branch of voluntary jurisdiction as extensively as any other court ever enjoyed it. Let the sheriff-clerks say by what authority they are deprived of it. The instructions 1666 leave the privilege of registra-

tion as they found it. At the same time, a very pregnant argument may be drawn from the silence of the instructions 1666, to support this branch of the commissaries jurisdiction. By this time it was become customary to substitute the general clause "of all judges books competent," in place of a special enumeration; and in this view the above *proviso* in the instructions 1563 is left out of the instructions 1666, which is in effect declaring the commissary-court to be competent for registrations upon the authority of the general clause. For had it been intended, that there should be no registration in these books, otherways than by an express consent, the *proviso* without doubt would have been renewed in the instructions 1666. As the instructions 1563 are copied in the instructions 1666, this *proviso* could not have been left out in the latter by neglect and inadvertence: the omission must have a meaning, which can be no other than to put the commissary-court upon the common footing that a consent at large should be sufficient.

But, in the second place, without necessity of going so far as the origin of this branch of the commissaries jurisdiction, a convincing argument may be drawn from a concession the sheriff-clerks do and must make; which is, that an express consent to registrar in the commissary-books is a sufficient authority for registration, whatever be the sum. If so, they must also admit that the style of registration in present use is a sufficient authority for this registration, provided it can be made out that it is equivalent to an express consent, which reduces the dispute to a question *de verborum significatione*, viz. What is the meaning and import of the clause of registration commonly used, "consenting to the registration hereof in the books of council and session, or others competent, to the effect that letters of horning, &c. may pass hereupon as effects?" This clause must undoubtedly be understood *secundum subjectam materiam*, as every clause must be. In writing a bond, the parties have no occasion to consider what court may be competent to a common process, but what courts are competent for registration. Keeping this in view, does not the clause obviously import a consent to registrar in any judges books where the registration can be a foundation for horning and other legal execution? From the very nature of the thing, the clause of registration must be interpreted in the most extensive sense for the conveniency of the creditor, who lends his money upon the condition of summary execution in case of failure of payment. And as it must be indifferent to the debtor, whether horning proceed upon a registration in one court or another, he has no interest to decline or bar any court; and therefore his consent thus interposed must be applicable to every court where express consent will make a legal registration. Will any man who borrows money make the least difficulty of giving an express consent to registrar in the commissary-books, if such a thing be demanded of him? What difficulty then can there be of giving a clause that sense, which the parties themselves would give were the question put to them?

And

And when the history of registration, and the variation introduced in the style within this century are attended to, they will clear the foregoing construction of the clause of registration beyond the possibility of cavil. The form of the clause of registration was originally to name one particular court where the deed was to be registered, such as the Court of Session, or commissariat of *Edinburgh*, or the sheriffdom of *Fife*, or other particular court. This being found inconvenient, by putting it in the power of the debtor to render the clause of registration ineffectual, by retiring out of the bounds of that particular jurisdiction, the practice came in of naming many particular courts. But such a long detail of particular courts becoming burdensome, the clause was made more general by enumerating commissary-courts, sheriff-courts, bailie-courts, &c. but still without the addition of a general clause, such as is now in use, "of all judges books competent." When we look through the records of the different courts, we find the commissary-court more frequently named in registrable writs than any other inferior court. The reason is, that, of all the inferior courts, it is the most convenient for registration, having of all the most extensive jurisdiction; and at any rate, it was an advantage to have different courts to apply to, in one or other of which the debtor might be found. The form last mentioned of enumerating all the different courts in general, as being still too prolix, was altered some time betwixt the 1650 and 1660, and a new style introduced, substituting a clause still more general, sometimes expressed thus, "In the books of session or other judges books;" or thus, "In the books of session or any other ordinary register;" or thus, "In the books of session or any other register that shall happen to be made use of for the time;" or thus, "In the books of session or of any other judge ordinary;" or thus, "In the books of session or others competent;" which last is now the established style. From the nature of the thing it must be plain, that all these different clauses mean the very same thing, *viz.* a consent to register in the books of any judge where that consent can be effectual to produce a decree, and consequently legal execution; and when it was the common practice at that time for creditors to provide for themselves the convenience of registering in the commissary-court books, it is not to be supposed that the whole moneyed people in *Scotland* should, without necessity, and even without solicitation, conspire together to give up a privilege or convenience of registering in the commissary-books. And yet this must be supposed, before the clause of registration now commonly used can admit of such a construction, as to refer only to courts which have a necessary jurisdiction.

I add, that no one can entertain the least hesitation about the import of the clause, when it is considered, that, by the practice of near a century, it is universally understood to comprehend voluntary as well as necessary jurisdictions. By a list given in it appears, that, upon the authority of the general clause alone, it has been a
constant

constant practice to record deeds without limitation of sums in the commissary-books. If consuetude be *optima legum interpret*, it ought to have no less authority in the interpretation of clauses in private deeds.

With regard to the registration of bills, which proceeds not by private consent, but by authority of a statute, the argument concludes a *fortiori* to the commissary-court. An express consent to registrate in the commissary-books may be taken in a bond if the general clause be reckoned not sufficient authority. There is no access to interpose such a consent in a bill of exchange; and therefore under the statutory clause, *competent judicature*, the commissary-court must be comprehended, otherways the lieges are cut out of the benefit of that court altogether. But, without insisting upon this, it is extremely clear from the act 1681, that it was the intention of the Legislature to put the registration of bills upon the precise same footing with the registration of bonds. The statute enacts, “ That bills of exchange shall be registrable in the books of council “ and session or other competent judicatories, to the effect of having “ the authority of the judges interponed thereto, that letters of “ horning, &c. may pass thereupon, sicklike and in the same man- “ ner, as upon registrate bonds, or decreets of registration proceed- “ ing upon consent of parties;” which is supplying the clause consenting to the registration, &c. and giving bills of exchange the same effect as if the clause were ingrossed in every one of them. Nor is it of any weight that, in a subsequent clause of the statute, the expression *ordinary judge* is taken in a different sense, being applied to judges who have a jurisdiction *in foro contentioso*, and who can hold plea in every process that can be founded upon a bill of exchange. It is well known that the Ordinary, or Judge-ordinary, is a general expression, and comprehends indifferently every judge who is competent with regard to the matter under consideration. The bishop is the ordinary in matters purely ecclesiastical: the commissaries are judges ordinary in matters of marriage and divorce: the Court of Session, in all civil causes, and peculiarly so in reductions and suspensions: the sheriff, in most ordinary causes both civil and criminal: and, with regard to decrees of registration, the Court of Session, commissary-court, sheriff-court, &c. are all equally judges ordinary. It therefore cannot create any sort of dubiety to find a generic expression applied in different senses, even in the same statute, *secundum subjectam materiam*, more than to find it so applied in different statutes, than which nothing is more common. And, were there any dubiety, which the commissaries cannot admit, it is removed by the practice of above 60 years; as bills of exchange have been constantly registered in the commissary-books ever since the date of the act, *et optima legum interpret consuetudo*.

The arguments above set forth acquire additional strength from the act 39. parl. 1696, allowing bonds and other writs to be registered after the granter's death, which has reduced registrations

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to a point of mere form, disregarding what is the most essential to a decree *in foro*. And when bonds can be registered in the sheriff-books after the granter's death, though in that case the sheriff can have no jurisdiction, it would be strange that it should not be lawful to register them in the commissary-books during the granter's life, though it is admitted, that in this case they have a jurisdiction by consent of parties.

It must also be observed, that the present dispute concerns the lieges in general, as well as commissary-courts in particular. It is evidently beneficial to the lieges to have different courts for registration, both for the convenience of finding their debtors, and for the convenience of being well served, which people always are when they have a choice. And it would be very extraordinary to deprive people of this privilege, by giving a sense to an expression different from the sense established by constant practice, especially as registrations have become a mere form since the act 1696.

The commissaries having set forth the grounds of law upon which their privilege is founded, proceeded to answer the objections that were stated in behalf of the sheriff-clerks. It was urged, "That if registrations be allowed in the commissary-books upon a consent at large, they must be entitled to hold plea upon every bond or obligation containing a clause of registration, for this reason, that, by the instructions 1563, they are declared to be judges to all contracts registered in their books, whereunto their authority is interponed." And the sheriff-clerks, in support of their argument, might have added a decision of this Court, *Durie*, 27th March 1627, *Irvine contra Young*; where it was found, that a consent to register in the commissary-books, is a prorogation of the commissaries jurisdiction as to all processes founded upon the deed.

This argument proceeds upon a misapprehension of the instructions 1563. There is no disguising the rapacity of the *Roman* clergy, nor their violent lust for power as well as property. Among other arts to draw causes to their courts, one was to use their interest with private parties to submit to their jurisdiction in civil causes. By degrees it became customary to insert a clause in deeds and contracts, binding the parties in all actions upon the deed or contract, to submit themselves to the jurisdiction of the spiritual court; and they who were the most forward in such matters, were the greatest favourites of the church. To vouch this fact, we have the public records, in which there are many obligations containing such clauses. And to leave no doubt about the meaning, these obligations, beside the consent to register in the commissary-books, contain a separate clause, "submitting them to the jurisdiction of the said commissaries;" and some of them go farther, not only "submitting to this jurisdiction," but "renouncing all other jurisdictions in this case." This practice fully explains the paragraph of the instructions founded on by the sheriff-clerks, which at full length stands thus, "That the

“ commissaries shall be judges to all contracts registrate in their
 “ books, whereunto their authority is interponed, and the party sub-
 “ mitting him to their jurisdiction; *et hoc accumulative et non priva-*
 “ *tive,*” where the expression, “ and the party submitting him to
 “ their jurisdiction,” obviously refers to the said practice of engros-
 sing such clauses in private deeds; which at the same time is a key
 to the like clause inserted in the instructions 1666, giving the com-
 missaries cognisance, “ in all causes where the parties submit them-
 “ selves to their jurisdiction.” And it may be observed by the bye,
 that this very thing is the foundation of a practice which continues
 to this day, that when an executor finds caution in order to confir-
 mation, he and his cautioner are taken bound to submit to the juris-
 diction of the court, and a place commonly named where they shall
 be cited.

These circumstances suggest a satisfactory answer to the argument.
 It is not laid down in the instructions 1563, nor any where, that the
 commissaries shall be judges to all contracts registrate in their books
 whereunto their authority is interponed: another requisite, still
 more essential, must concur to have this effect, *viz.* that there must
 be a clause in the contract, “ submitting to that jurisdiction,” which
 by both sets of instructions, as well as by constant practice, has the
 import of prorogating the jurisdiction of the commissaries *in foro con-*
tentioso. Without that clause, the bare consent to registrate in their
 books has not the effect of prorogating the jurisdiction of the com-
 missaries *in foro contentioso*. Custom has given it no such effect, and
 the clause gives no such effect; for, after a decree is interponed in
 virtue of such consent, the consent has its full effect, and no further
 consequence can be built upon it: and this serves to reconcile two
 decisions, which, at first view, appear contradictory: in that above
 mentioned from *Durie*, where a decree against an heir as lawfully
 charged to enter was sustained, though pronounced by the commis-
 sary of *Dunkeld*; there has certainly been a clause submitting to the
 jurisdiction of that commissary, though not mentioned in the deci-
 sion; but in another decision observed by the same author, 28th No-
 vember 1621, laird of *Greenock*; the commissaries were found not to
 be proper judges to an action of transferring of a contract against
 the heir of the contractor, though the contract itself was registrate
 in the commissary-books, by virtue of the consent to registration;
 probably for this reason, that the contract has not bore the other
 clause, submitting to their jurisdiction.

The sheriff-clerks insisted on another argument, “ That it was ab-
 “ surd to confess a debt in judgment before a court not capable to
 “ hold plea, nor take cognisance of such debt; and it was added,
 “ that in *England* confession of debt cannot avail in any court ex-
 “ cept in a court of common law, capable to hold plea upon such
 “ debt.”

It was answered, That the sheriff-clerks seem to forget what they
 have all along admitted, that a decree of registration is good where
 the

the instrument of debt bears a clause to be registered in the commissary-books. They must allow this not to be absurd; and yet here is a confession of debt, and also a judgment pronounced upon that confession, in a court not capable to hold plea, nor to take cognisance of such *in foro contentioso*. The sheriff-clerks seem also to forget the act 1696 above mentioned, which empowers Judges to pronounce a decree of consent against a man even after his death: such a wide difference is put betwixt a voluntary jurisdiction, and a jurisdiction *in foro contentioso*. And as to the law of *England*, the mayor of *London*, by the custom of the city, may take recognisances, which are no other than a confession of debt before a magistrate, to save the trouble of proof. The king, by a special commission, may appoint any person to take recognisance, and a debt acknowledged before one of the clerks of the statute-merchant and mayor of the city of *London*, or two of the merchants of the said city for that purpose assigned, becomes what is called a statute-merchant, of the like nature with a bond in judgment, or a bond in *Scotland* with a clause of registration. It is very true, such deeds must be enrolled in some court of record to give them the effect of execution, and so must a bond containing a clause of registration; but then, the commissary-court is such a court of record. And it is of no importance in the argument, that a bond in judgment, or a bond containing a clause of registration cannot be recorded in the Courts of Justiciary, Exchequer, or Admiralty; for the commissary-court differs widely from any of these, having a jurisdiction without limitation in civil causes, where it is prorogated by consent of parties. The debtor's consent to be registered in their books, empowers the commissaries to pronounce decrees of consent without limitation, and the debtor's consent submitting himself to their jurisdiction, empowers them to hold plea upon that debt even *in foro contentioso*.

Some other instances shall be given to show the difference betwixt decrees of consent, and decrees *in foro contentioso*. A charter-party may be registered in the Court of Session, or in the sheriff-court; yet the Court of Session cannot hold plea in the first instance upon a charter-party *in foro contentioso*; and the Sheriff not at all. A bond granted to the king in a revenue-matter may be registered in the Court of Session, and must be so registered if adjudication be to proceed upon it; yet the Court of Session cannot hold plea *in foro contentioso* upon such a bond. Nothing was more ordinary of old than to register bonds in the books of the Privy Council, though it never fell under the jurisdiction of that Court to hold plea upon actions of debt. And after all, what needs more than to give for an instance a decree of registration given against a man after his death, over whom there can be no jurisdiction.

N^o CX.

19th July 1748.

SHERIFF-CLERKS *contra* COMMISSARIES.

JURISDICTION.

IN a question betwixt the commissaries and sheriff-clerks, whether it belongs to the jurisdiction of the former to authenticate tutorial and curatorial inventories ; the Court was of opinion, that this was a branch of their jurisdiction, moved by the following reasons. The causes of widows, orphans, and pupils, have in all periods of our law been privileged. By the act 105. parl. 1487, they are entitled to bring their actions and complaints at the first instance before the King and council. Afterwards such causes came to be the province of the consistories ; and upon this account a jurisdiction is bestowed upon the commissaries by the instructions 1563, in the causes of widows, pupils, and the poor, not exceeding L.20 Scots : they had consequently a voluntary jurisdiction in the chusing curators, which appears from the act 35. parl. 1555, in which, though the Judge-ordinary is only named, yet the summons or edict plainly refers to the consistorial court ; and this is put out of doubt by Queen Mary's charter to the commissaries of *Edinburgh*, giving them a jurisdiction in all actions concerning teinds, testaments, injuries, and the giving of curators, conform (says the charter) to the act of our parliament, plainly referring to the said act. Therefore, they have unquestionably a voluntary jurisdiction as to the naming tutors and curators, which they enjoy at this day, and which neither is nor can be controverted. The only question then is, after tutors and curators are named before the commissaries, whether it be the meaning of the act 2. parl. 1672, to oblige the minor to go before another court to get the inventories authenticated ? Such an absurd interpretation cannot be drawn from the statute ; which was only intended to superinduce an additional check upon the management of tutors and curators, and not to break in upon any jurisdiction whatever ; and nothing is more evident than that the expression, *Judge-ordinary* in that statute, means every judge who is competent to the naming tutors and curators.

N^o CXI.

17th December, 1748.

SHERIFF-CLERKS *contra* COMMISSARIES.

JURISDICTION.

BETWIXT the sheriff-clerks and commissaries it was debated, whether decrees in absence pronounced by the latter for sums above L.40 Scots are effectual in law, or whether they are to be considered

considered as simply void. The sheriff-clerks founded upon the instructions 1563 and 1666, limiting the jurisdiction of the commissaries with regard to actions of debt and other causes referred to oath, to the sum of L. 40 Scots. In answer to this, the commissaries opposed the same instructions, declaring their court competent to all actions where the parties submit themselves to their jurisdiction. Whence they argued, that they must have a radical jurisdiction in matters above L. 40 Scots; because, by the law of *Scotland*, private consent cannot create a jurisdiction. From these premises they inferred, that a decree in absence must be good, even where the sum is above L. 40 Scots; and that the meaning of the instructions must be, not to render void such a decret, but only to bestow upon the lieges a privilege of declining the jurisdiction if they thought proper.

In support of this proposition, they entered into a particular consideration of the doctrine of the prorogation of jurisdiction as received among us. They observed, that in reasoning upon this subject, we are apt to draw our authorities from the *Roman* law, without considering that the principles of the *Roman* law in this matter are *toto cælo* different from ours.

The *Roman* doctrine of prorogations is laid down with great accuracy, *l. 1. de judiciis*: The words are, “Si se subjiciant alicui jurisdictioni et consentiant; inter consentientes, cujusvis judicis qui tribunali præest, vel aliam jurisdictionem habet, est jurisdictionis.” Thus, though consent by the *Roman* law cannot make a man a judge who is no judge, yet it has the effect to give a judge a new jurisdiction, and to enable him to determine in cases to which without the consent he is altogether incompetent. Upon this footing, a civil judge may determine in a criminal matter, *et è contra*; and a judge whose jurisdiction is limited with regard to sums, may give judgment without limitation, “Judex qui usque ad certam summam judicare jussus est, etiam de re majori judicare potest si inter litigatores conveniat. *l. 74. § 1. de judiciis.*” And hence the doctrine laid down by commentators may be easily understood. They mention four different ways by which a jurisdiction is limited, viz. with regard to time, place, persons, and causes. As to the two first, it is evident from the law above cited, that there can be no prorogation: a judge after his commission is at an end, has no manner of jurisdiction; and as little jurisdiction has he without the bounds of his territory. But, with regard to persons and causes, the matter is otherwise: for though consent will not make a private man a judge, yet supposing him a judge, it will intitle him to give judgment against a person not otherwise subjected to his jurisdiction, and in a cause with regard to which he has no original jurisdiction.

The doctrine of the law of *Scotland* differs widely; and *first*, with regard to persons, it is established by act of parliament, that even an express consent will not empower a judge to pass sentence against a man who lives without his territory, and consequently is not subjected to his jurisdiction. The act 38. parl. 1685, declares the re-

gistration of deeds against parties who dwell not within the jurisdiction to be void and null, with all the execution that follows thereupon. Therefore a consent to register in the books of a competent court, which in all views will comprehend the sheriff's books, will not however give the sheriff a jurisdiction over any person who is not locally subjected to his jurisdiction. And accordingly, a consent by a debtor in *Caitbness* to register in the sheriff-books of *Edinburgh* will avail nothing. Next, as to causes, a consent to register in the books of Justiciary or Exchequer, will not intitle these judges to pronounce sentence for an ordinary debt. The decree will be null, with all execution following thereupon. Further, if a man shall bring a process before the Exchequer for payment of an ordinary debt, the debtor's appearance and pleading peremptory defences will not prorogate the jurisdiction; the decree is void and null. And such has been the opinion of this Court in much narrower cases: an action of contravention of lawburrows is peculiar to the Court of Session; and if such a process be brought before the inferior court, the defender's appearance will not prorogate the jurisdiction; the decree will be null by way of exception, *Haddington*, 6th July 1611, *Kennedy contra Kennedy*: And the like was found in an extraordinary process of removing, founded upon the tacksmen's failure to pay his rent; the decree pronounced by the inferior judge was found null, though the defender appeared and pleaded his defences without objecting to the jurisdiction, *Falconer*, 22d December 1681, *Beaton contra his tenants*.

It appears then to be a maxim with us, that consent alone cannot found a jurisdiction, nor empower a judge to determine any cause as to which he has no jurisdiction, nor against any person not subjected to his jurisdiction. If now consent cannot operate with us, as with the *Romans*, to erect a jurisdiction, the only effect that can be given to consent is, to bar a declinator when a party enjoys the privilege to be exempted from a court which has a radical jurisdiction over him; and the barring of such a privilege is the only prorogation of jurisdiction that is known in the law of *Scotland*. Thus a decree pronounced by an inferior court against a member of the College of Justice is good by prorogation, if the court be not declined; and a decree pronounced by the Court of Session in a maritime cause is good where the defender appears and submits to the Court, without insisting upon his privilege of being heard in the first instance before the Admiral.

Hence it was urged, that if consent create not a jurisdiction, nor has any other effect than to bar a privilege of declining a court, the commissary-court must have a jurisdiction in matters above L. 40 *Scots*, because they can judge without limitation upon the consent of parties, which can have no other effect than to bar a declinator; and if so, the commissaries may pronounce a decree in absence for whatever sum, as well as they can pronounce a decree *in foro*, when the defender appears and states his defences without moving his declinator.

clinator. And to prove that this is the legal sense of the instructions, a decision was quoted, pronounced recently after the instructions 1666, by judges who best knew their meaning, because probably they had a hand in composing them. It is reported by *Stair*, 25th June 1668, *Black contra Scot*, where a decree in absence pronounced by a commissary for L. 126 *Scots*, upon the defender's being held as confest, was, after his death, sustained against his representatives as good evidence of the debt.

Replied: That strictly speaking the commissaries never had a jurisdiction in civil causes, whether the sum was great or small. Civil claims were brought into the ecclesiastical court in a religious view, and as a matter of scandal; and when a decree was pronounced for the sum claimed, it was not upon the medium of being a civil debt, but upon the medium of restitution as part of the penance enjoined. This application to the spiritual court was rendered unnecessary after the oath of party was introduced from the *Roman* law; and accordingly, it is laid aside by the instructions, except for sums within L. 40: so far a branch of civil jurisdiction is communicated to the commissaries; and in actions of debt within L. 40, referred to oath, they now interpose not as spiritual but properly as civil judges. Taking then the matter in its true light, the jurisdiction of the commissaries is not limited by the instructions, but a new jurisdiction bestowed upon them in actions of debt to the extent of L. 40 *Scots*: with regard to sums beyond that extent, they have no jurisdiction more than the Court of Justiciary has in civil causes. But then this court stands upon a singular footing, that private consent can bestow a jurisdiction upon it; for so is expressly declared by the instructions. And here is one instance of a prorogation in our law, similar to prorogations in the *Roman* law. Perhaps it may be the only instance in our practice of a jurisdiction created by consent; but, supposing it the only instance, it removes the argument urged for the commissaries; after which the authority of the instructions stands clearly against them, that being limited in civil causes to L. 40 *Scots*, they cannot pronounce a decree in absence for a greater sum.

" Found, that the commissaries have no power to pronounce decrees in absence for any sum above L. 40 *Scots*."

N^o CXII.

3d November 1749.

Duke of Roxburgh *contra* Scot of Gala.

P R E S C R I P T I O N .

THE Duke of Roxburgh, in a process against *Scot of Gala*, claimed right to the teinds of the parish of *Lindain*, and for his title produced a charter from the Crown *anno* 1607, containing these teinds.

teinds. The defence was, that the family of *Roxburgh* never possessed these teinds, therefore, that the pursuer is cut out by the negative prescription, and the defender has acquired the subject by the act 1690, as patron of the parish. It was answered, That, by the said act, patrons got only right to teinds not heritably disposed; and, 2^{do}, That a right to teinds is not lost by the negative prescription. It was replied to the *first*, That it is the intention of that statute to bestow upon patrons teinds not heritably disposed, that is, teinds to which no private person has an heritable and perpetual right; which is the present case; because the Lord of Erection having lost his right by the negative prescription, the teinds of this parish returned to the Crown, and came to be in the same situation as if they never had been heritably disposed. Replied to the *second*, That vicarage-teinds are *local*, and are unquestionably *funditus* lost by the negative prescription; or, more properly speaking, are consuetudinary, and not exigible, unless so far as they have been in use to be levied. And as to parsonage-teinds, that no heritor indeed can claim a total exemption, being due by the public law, which subjects all lands not particularly excepted to the burden of parsonage-teinds: but with regard to titulars, that a right to parsonage-teinds may be acquired by the positive prescription, and lost by the negative prescription, as well as other private rights.

In support of this argument it was observed, that there is a wide difference betwixt rights founded on private consent, and rights founded on the law of nature, or on the public law: the former sort only are lost by the negative prescription. The reason of the thing extends no further, as shall be by and by explained; and the words of the statute extend no further, "Ordains that actions competent of the law upon heritable bonds, reversions, contracts or others whatsoever, either already made, or to be made after the date hereof, shall be pursued within the space of forty years;" where the words "made or to be made," plainly limit the subject of the negative prescription to private deeds. As to rights founded upon the law of nature, or upon the public law, there is no reason these should fall by the negative prescription: they are rights known to every mortal, which every mortal must lay his account with. There can be no *bona fides* to object to such rights: for example, the heritors of every parish are liable to uphold the parish-church, and to rebuild the same where rebuilding is necessary: if there should be an example of a certain heritor who had not contributed to this work for centuries, this circumstance would not relieve him; he must contribute whenever he is called upon. In like manner, a right to teinds is established by the common law of the land, and does not depend upon private consent. Every man who purchases an estate without purchasing the teinds must lay his account to be liable for teind: he can have no *bona fides*, and therefore cannot be saved from the claim by any length

length of time; and this is the very language of our authors and decisions. "A right to teinds (says Lord *Stair*, B. 2. Tit. 12. § 22.) "being founded on public law, prescribes not, except as to bygones, "before 40 years. And the possessor cannot prescribe an absolute "immunity and freedom, seeing all lands in *Scotland* by law are liable in teind, except such as never paid any, being *cum decimis inclusis*, or belonging to the *Cistercian* order, templars and hospitalers, or glebes," &c. The like reasoning is to be found in the decision observed by *Stair*, 7th February 1666, Earl of *Panmure* contra *Parishioners*, "The right to teinds is founded on law, and not a "particular or private right; and therefore, though in a competition among private parties, one right to teinds may be excluded "by another, yet the teinds themselves must always be due."

It is quite consistent with this doctrine, that the rights of private parties may be regulated by prescription both positive and negative. This is evident with regard to superiority; for though every proprietor of land must have a superior, yet it is often determined by prescription who is the superior. In like manner, though all lands are burdened with teinds, yet prescription may determine the titular.

The defender further insisted, that there is not such a thing in our law as bestowing a right by the positive prescription, independent of the negative prescription; and that unless the proprietor lose his right by the negative prescription, no other can acquire by the positive. To clear which point, the act 1617 was urged, which puts not the right acquired thereby upon the possession of the purchaser for 40 years without challenge, but upon acquiescence of the former proprietor. This appears from the statute itself, "declaring that "the person who possesses for 40 years, without any lawful interruption, shall never be troubled, pursued, or unquieted by any person "pretending right;" and more fully from the act 12. parl. 1633, containing a commentary on the said act in the following words: "Whereas by act 1617, all heritable rights clad with 40 years possession, are declared to be irreducible in all time coming, except "the same be quarrelled within the space of 40 years;" therefore, &c. Hence, if the person intitled to challenge be *non valens agere*, the whole or any part of the time, the positive prescription does not run; as, for example, if the land be liferented by any one deriving right from the person intitled to challenge the possessor's right, see *Dictionary (Prescription)* p. 124. *Ergo* the positive prescription is not independent of the negative prescription, but the consequence of it. And the two following cases are remarkable instances of this. *1mo*, A registrate reversion never prescribes negatively, and therefore the positive prescription is not good against it. *2do*, If an infeftment of annualrent be preserved from the negative prescription by the debtor's paying interest perhaps for 100 years, no purchaser of the estate burdened with the annualrent, will be secure.

Now if the negative prescription both of land and teinds must first take place, before there can be a positive prescription of either, the

consequence is evident, that the negative prescription being antecedent to, and independent of the positive prescription, must equally take place, whether there be a positive prescription or not. If a party purchase *bona fide* lands with the teinds thereof, this right must be available to him, to object the negative prescription against the titular claiming the teinds, just as much as if he had the positive prescription. And for the same reason, the defender, who has right to the teinds of the parish, by the act 1690, is, by virtue of that right, intitled to object the negative prescription to the pursuer, just as much as if he had been in possession by the act 1690, for 40 years.

And in this matter a right to teinds appears to go hand in hand with a right to land. In a declarator of the property of land, the Presbytery of *Perth* against the Magistrates of *Perth*, 24th December 1728, the Lords repelled the allegiance of the negative prescription, in respect of the answer, that the defenders had produced no title to the land in controversy; and justly, because a naked possessor has no legal interest to make such objection: and it would be unreasonable to put the pursuer to the expence and trouble of proving interruptions, in competition with the defender, who is only a naked possessor. The same no doubt would obtain with regard to a declarator of a right to teinds. But if the magistrates of *Perth* had produced a title of property, though not fortified by the positive prescription, to have founded them in a legal interest to make the objection, there appears to be little doubt, that the objection would have been sustained. In the present case, the defender hath undoubtedly a legal interest to make the objection: he has right to the teinds in question by the act 1690, supposing the pursuer's right to be lost by the negative prescription.

The reasoning was closed with an observation, that the point in dispute is of importance to the lieges in general. As the bulk of the teinds in this kingdom have been under tack, it is not in every case that a man who has an heritable right to teinds can support his claim by the positive prescription. Now, if no man could plead the negative prescription, who has not the positive prescription to found on, teinds would be in a very precarious state. This consideration may be carried still further: positive prescription is a privilege granted to his Majesty's lieges only, not to his Majesty himself: therefore, according to the pursuer's doctrine, the actual possession of teinds for a century would not secure the Crown against any private party producing some old right in his ancestor, unless it could be instructed by what means the Crown came to acquire the right, which seldom can be done after such a distance of time.

In answer to this reasoning, it was insisted on by the pursuer, that the negative prescription is only of actions and not of rights of property. An heir-apparent makes up a title to his predecessor's estate by a trust-adjudication, and calls the possessors to produce their titles: if they cannot produce a good title to the property, whether by a disposition from the pursuer's ancestor, or by the positive prescription, the

the heir will obtain certification, and prevail in a reduction and declarator. For it was never sustained in this case as an objection, that the pursuer is excluded by the negative prescription.

“ Found, That the pursuer had right to the parsonage and vicarage teinds of the parish, and preferred him to the same.”

One thing is clearly established in our practice, that possession for 40 years upon a good title does not transfer property by the positive prescription, unless at the same time the former proprietor has lost his right by the negative prescription. Upon this principle is founded an effectual objection against the positive prescription, *viz.* that the person to whom the subject belonged was *non valens agere*. But then admitting that the positive prescription cannot run independent of the negative prescription; it does not follow, that the negative prescription of rights of property can run independent of the positive prescription; though this is *Gala's* plea, which therefore is not well supported by argument. It appears more agreeable to the act of parliament, and to our practice, that the negative prescription of rights of property can no more run independent of the positive, than the positive can independent of the negative. If the negative prescription alone were to have the effect, why should a habile title be necessary to the possessor in order to secure him after 40 years? The true conception of the matter appears to be, that, in order to transfer property by prescription, both the positive and negative prescription must concur.

The matter was again laid before the Court by the defender, but with the answers the Duke having produced a charter *anno* 1687, containing a *novodamus* from the Crown of the teinds in question, and it being represented, that the present process commenced in the year 1712, the Court had no occasion to resume the point of law, seeing this new production removed the objection that the Duke had lost his right by the negative prescription, as there was no time for prescription from the 1687 to the 1712.

N^o CXIII.

22d November, 1749.

LORD BOYD *contra* King's ADVOCATE.

F I A R.

THE *Tork-building Company*, in the year 1743, granted a lease for twice nineteen years of the estate of *Linlithgow*, to *William Earl of Kilmarnock*, and *Anne Countess of Kilmarnock* his wife, and the survivor of them, and the heirs, executors and administrators of the survivor. The Earl suffered death for his accession to the rebellion 1745, and the estate of *Linlithgow* was surveyed by the Exchequer, as what he was interested in by the lease. After the death of the Countess,

Countess, who survived her husband, a claim was brought by Lord *Boyd* her son, setting forth, that the Countess, by her survivorship, was intitled to this tack, and that the right descended to the claimant as her representative. It was answered in behalf of the Crown, that the husband was fiar of the lease, and the wife only liferenter in case of her survivorship; that it was attachable by the husband's creditors, and therefore was forfeited to the Crown by the husband's attainder.

In the pleading, the point chiefly insisted on by the King's Advocate was, that property cannot be *in pendente*; that either the husband or wife must have been proprietor the moment the lease was executed; and if it was in the husband, it could not go from him to his wife, merely by her survivorship. When the cause was advised, *Elcbies* observed, that the maxim against a fee being *in pendente*, is not applicable to this case, in respect that a lease, though made real by statute against singular successors, is but a personal contract, conveying no property to the lessee, but only a right of possessing for a rent certain; and that for this reason, there is nothing in law to bar a tack to be granted to two conjunctly, neither of whom has the power of disposal without consent of the other. He added, that this was a different case from a bond where one must have a power of taking payment, because the debtor must always have a power to pay.

“ Found the right to the lease was in the Countess of *Kilmarnock*
 “ the survivor, and therefore sustained the claim.”

The distinction made by *Elcbies* is no doubt just, but it was unnecessary. A land estate may be disposed to two conjunctly, and to the longest liver, and to the heirs of the longest liver. Here the intention is plain, that the property should be in the two during their joint lives; and that the survivor should have the sole property. Is there any thing in the nature of property to prevent such a settlement from taking effect? I cannot see that there is. A common property is well known in law, and a fee is not *in pendente* when it rests upon two, more than upon one. The *English* are well acquainted with this sort of right, which they term a joint tenancy, and which they distinguish from a right of copartnership where the subject is also possessed in common, but the interest of each of the partners descends to his heirs, and not to the survivor. In a word, by such a settlement as that in question, each party has right to the whole, *sed concursu partes faciunt*; and therefore the survivor takes the whole in his or her own right, not as succeeding to those who predecease.

N^o CXIV.

15th February 1750.

DUKE OF GORDON *contra* The CROWN.

P A P I S T.

GEORGE Duke of Gordon, who was infeft *anno* 1684 upon a charter under the great seal, executed in the year 1711 a gratuitous bond for a great sum of money to his eldest son *Alexander* Marquis of Huntly, upon which the Marquis adjudged the family-estate, took a charter of adjudication from the Crown, and was infeft *anno* 1712. *Alexander*, the Marquis, afterward Duke of Gordon, having died in the 1729, his son *Cosmo-George* made up titles to the estate, by a special service as heir to *George* Duke of Gordon his grandfather, neglecting the title that was in his father Duke *Alexander*; and he was infeft in the 1731.

Sir *Evan Cameron* was infeft *anno* 1688 in the twenty merk-land of *Mamore*, held feu of the Duke of Gordon. Sir *Evan* disposed the said land to *Donald Cameron* his grandson, with procuratory and precept; who, in the year 1724, obtained from *Alexander* Duke of Gordon a charter of resignation, upon which he was infeft.

Donald Cameron being attainted of high treason for joining in the rebellion 1745, the present Duke of Gordon, as superior of the land of *Mamore*, claimed the same upon the clan-act.

The objection made against this claim in behalf of the Crown was, that the titles of the forfeiting person, and of the claimant, are inconsistent with each other; that if the superiority was in Duke *Alexander*, which must be supposed to validate *Donald Cameron's* infeftment as vassal, the present Duke can have no claim to the superiority, not having served to his father but to his grandfather; that, on the other hand, supposing the claimant to be regularly infeft in the superiority, Duke *Alexander's* right was null and void; and consequently the charter granted by him to *Donald Cameron* was a *non habente potestatem*.

Answered, 1^{mo}, Supposing the inconsistency, and that either *Lochiel* must be considered as heir-apparent in the property, or the claimant heir-apparent in the superiority, the claim is notwithstanding good upon the clan-act. For, 1^{mo}, The benefits given by this act, being intended as an encouragement for loyalty, must take place with regard to heirs-apparent, as well as with regard to those who are infeft. In this statute, the *Highland* chieftains were principally in view, who have the same power over their clan infeft or not infeft. 2^{do}, In law language, and in all our acts of Parliament, the terms *superior* and *vassal* are applicable to heirs-apparent, as well as to those who are entered. A lord may demand subsidy from his vassal for making his eldest son a knight, and for marrying his daughter,

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Stat. 2. Rob. I. cap. 18. The King cannot interpose any other superior betwixt him and his vassal, *Stat. Rob. III. cap. 4.* Here by vassal, is meant one not infeft, as well as one infeft. By act 57. parl. 1474, the over-lord, or superior, not entering to the superiority in order to infeft his vassal, shall tine the superiority for life. Here the heir-apparent in the superiority has the name of over-lord, and the heir-apparent in the property, the name of vassal. *3^{to}*, The treasons in that statute are evidently applicable to heirs-apparent, and therefore the benefits, which are commensurate with the treasons, must also be applicable. *4^{to}*, Where the superiority is forfeited to the Crown by the forfeiture of the superior infeft, it seems undoubted that the heir-apparent in the property is intitled to demand a charter from the Crown in terms of the clan-act: and the privilege must be reciprocal; and if it be competent to the heir-apparent of the vassal, it must also be competent to the heir-apparent of the superior.

Answered, *2^{do}*, The claimant's infeftment as superior, is perfectly consistent with *Lochiel's* infeftment as vassal; and to make out this it shall *first* be shown, that *Lochiel* was regularly infeft in the property; and *next*, that the claimant stands regularly infeft in the superiority; to which ends it will be necessary to give the analysis of the Popish act 1700.

By this statute it is enacted, That if a succession devolve to a papist, "his right and interest in or by the foresaid succession shall be come void and null, and shall devolve and belong to the next protestant heir." To clear the meaning of this clause, we shall suppose Duke *Alexander* had been served heir to his father, and been regularly infeft. And the question is, Whether this feudal title to the estate was intrinsically null and void, so as to put the Duke upon no better footing than an heir-apparent? Answered, Such infeftment is not declared to be null and void to all intents and purposes, but only as to the right and interest of the protestant heir. And that it is not intrinsically void and null, will be evident from the following considerations: *1^{mo}*, Upon that supposition, it would not be competent to the popish heir to pursue a declarator of non-entry. *2^{do}*, If the papist does thereafter purge himself of popery, his prior infeftment is good to all intents and purposes. And, *3^{to}*, His creditors by this very statute are declared to be secure, if their debts be contracted before their debtor is excluded from the estate by the protestant heir. They are considered as debts contracted by a proprietor infeft, and execution will be competent upon them accordingly.

But though such infeftment is not *ipso facto* null and void, yet it is declared to be null and void with regard to the heir's own right and interest in the estate, in order to make way for the protestant heir: it is null *quoad* the papist himself, so as to bar him from taking any benefit by the succession. Therefore it is not a good title in a declarator of property, nor in a removing, nor in mails and duties, nor in any real action that is for behoof of the papist himself. It

does

does not bar the protestant heir from serving to the remoter predecessor, it being declared his privilege to be so served without regard to the papist. But there is nothing in the statute to hinder the infestment of the popish heir to be a good passive title against him, so as to oblige him to pay his predecessor's debts, to infest a purchaser who has bought land from the predecessor by a minute of sale; and in general, to perform all deeds which an heir served can be compelled to by process. For this nullity was never intended to hurt third parties, his Majesty's protestant subjects, but only to bar the papist himself from enjoying the estate, or reaping any benefit by it. In short, such infestment is a good passive title to subject the papist entered heir, in the same manner that a protestant would be subjected; but is not a good active title: it was not meant to relieve the papist from burdens, but only to exclude him from benefits. And this regulation is extremely rational; a popish heir, if he abstain altogether, which he ought to do by the law of the land, has no benefit, and will be subjected to no burden; but if he will enter in contempt of the law, it is just that his entry should make him *passive* liable, in the same manner that it makes other heirs; and the entering vassals is one of these burdens to which he is subjected, and to perform which he can be compelled by a process.

The other point is to make out, that the claimant is regularly infest as heir to his grandfather. And to handle this point with the greater perspicuity, we shall first consider the case of a popish heir who is in possession by apparency, from whom the estate is claimed by the protestant heir. In this case the statute is express, that "it shall be lawful to the protestant heir to serve heir to the defunct, to whom the intervening papist might have succeeded." This service then of the protestant heir is a complete title to the estate, without necessity of any declarator, to enable him by a process of removing, or mails and duties, to turn the popish heir out of possession. And if the popish heir should pretend to defend himself upon his apparency as nearest heir, the answer would be sustained, that he is a papist. *2do*, The case would be the same, though there was a conveyance of the estate to the popish heir: the statute makes no difference betwixt a title by conveyance and a title by apparency.

The only difficulty in this case is, that Duke *Alexander* was infest as heir to his predecessor: or, which comes to the same, was infest upon an adjudication founded upon his predecessor's gratuitous bond: and it may be thought that this infestment could not be taken away otherways than by a declarator or reduction. But in answer it may be observed, *1mo*, That such an infestment being taken *prohibente lege*, is null and void so far as founded upon to the prejudice of the protestant heir; and therefore cannot require a rescissory action, or action of reduction, which supposes the right to be effectual in law till it be taken out of the way by a process. The statute deprives the popish heir of the privilege of possession as well as of property; and

and therefore the objection of his being popish will not be reserved to a reduction, but is competent by way of exception: it is competent in this form to the tenants of the estate who are pursued in removings, or for mails and duties, and *multo magis* to the protestant heir, as to whom the infestment is not merely voidable, but void. And if a conveyance upon which the popish heir is infest requires not a reduction, which is plain from the statute, as little can an infestment upon a service require a reduction. 2do, As to a declarator, which is the proper action for making nullities effectual, and for ascertaining any right that may be disputed, it appears obvious from the nature of this action, that it is calculated merely for expediency, and can never be necessary *de jure* in any case: it is an action peculiar to this country, and is not known in *England*. We have no occasion to mention here declarators of escheat, of bastardy, of *ultimus heres*, and such like, which are of a peculiar nature, and which *de praxi*, are necessary solemnities to establish some sort of rights. The King may bring a removing against any man who is in possession of the annexed property; and the superior may bring a removing against his vassal who has incurred a conventional irritancy *ob non solutum canonem*: a declarator is indeed competent in both these cases, but is not necessary in either. An irritancy of entail, it is true, cannot well be made effectual but by a declarator; because the heir, who is intitled to lay hold of the irritancy, cannot bring an action of removing, or of mails and duties, without a service; and no inquest will readily serve him, until the irritancy be first declared; because private men will seldom undertake determining such intricate points. But a person's being a papist is not an intricate point, and no jury will decline to find so upon good evidence. A service thus obtained will be a good title in a removing to turn the popish heir out of possession; because the popish heir, who is declared to have no benefit by the succession, is not intitled to the privilege of possession more than of property. And in this particular, he is to be distinguished from an heir of entail committing an irritancy, and from a vassal committing an irritancy *ob non solutum canonem*, who are not thereby deprived of their right of possession.

But the claimant has no great occasion for the foregoing arguments. His case is different, being a service to his grandfather after his father's death. And even supposing a decree of declarator to be a necessary step for turning his father out of possession, yet surely a declarator after his father's death cannot be necessary, nor even competent; because the claimant has no person to declare against, nor any person to sustain the part of defender. And Lord *Stair*, B. 4. Tit. 3. § 47. justly observes, "That declarators use not to be raised or insisted on where there is no competition or pretence of any other right," which is precisely the present case; and which is agreeable to the rules that govern this action, that it is not necessary in law, but only calculated for expediency, in
order

order to ascertain the pursuer's right, when he foresees the same will be disputed.

To sum up the whole, the infestment of a popish heir is a singular sort of right. It subjects the heir entered to all the passive effects of a service, in the same manner as if he were a protestant; and particularly to the obligation which superiors are under to enter their vassals. But such infestment can afford the popish heir no active title; and particularly it is null and void as to the protestant heir served to the remoter predecessor; which being considered, there can remain no doubt that the protestant heir may serve to the remoter predecessor, if the popish heir be dead.

The President was clear upon both points: *1mo*, That heirs-apparent have the benefit of the clan-act. *2do*, That the claimant was habily vested in his estate by his service to his grandfather. All the Judges were of the same opinion, except the Justice-Clerk and *Elchies* who did not vote. But the two points were not voted separately. The question was put in general, Sustain the claimant's title, or not? and it was carried, Sustain.

N^o CXV.

13th June 1750.

Lady KINLOCH *contra* GEORGE DEMPSTER.

R I G H T in S E C U R I T Y.

SIR *James Kinloch* having sold the land of *Glenprofin*, upon which his lady was secured for her jointure, gave her a security upon the estate of *Kinloch*. The deed is in the 1730; she was infest *December* 1742; and her sasine recorded in *February* 1743.

Sir *James* having disposed his estate to his eldest son in the latter's contract of marriage, reserving a faculty to contract L. 20,000 Scots, found it necessary to have a ready fund to answer his demands, which his faculty could not procure him, as few people will lend money upon the faith of a faculty. Toward this end he and his son concurred in an heritable bond to *George Dempster* for the sum of L. 20,000 Scots, dated in *November* 1742, upon which sasine was taken the 22d of *December*, and recorded the middle of *January* 1743, before recording the lady *Kinloch*'s sasine. But as no more than L. 8000 was advanced of ready money at the date of the heritable bond, *Dempster* gave Sir *James* a backbond, acknowledging, that he had advanced no more but the said sum, and obliging himself to pay and deliver to the said Sir *James* and his son upon their joint order, or to Sir *James* upon his own order, at any term of *Whitsunday* or *Martinmas* upon a requisition of 40 days, all or any part of the foresaid balance of L. 12,000. And it concludes with this clause: "But if the sum already advanced, and others hereafter to be re-

quired, shall not extend to the foresaid sum of L. 20,000 Scots,

N n n

" then,

“ then, and in that event, the foresaid heritable bond, with what
 “ shall follow upon the same, shall be, and is hereby restricted to
 “ what shall be truly paid and advanced of the said L. 20,000.”
Dempster advanced the said balance in *December* 1743, by which the
 whole sum in the heritable bond was purified.

In the ranking of *James's* creditors, the lady claimed preference
 before *Dempster*, except as to L. 8000 advanced at the date of the
 heritable bond. It was premised for her, that if the heritable bond
 be taken by itself, which bears the actual loan of L. 20,000, no ob-
 jection can lie against Mr *Dempster's* preference. But it appears from
 the backbond of the same date, that part only was advanced, and
 that the remainder was to be advanced or not at Sir *James's* option.
 Lady *Kinloch* then is preferable before *Dempster*, except as to the
 money advanced at the date of the heritable bond, upon two
 grounds: *imo*, Infestment granted for security of money cannot,
 from the nature of the thing, be effectual beyond the money advan-
 ced: a sum cannot be secured unless there be an actual security, and
 as little can a security subsist without a debt of which it is the secu-
 rity; *ergo*, *Dempster* at the date of his infestment had a real security
 for L. 8000 only; and he was not intitled to draw one shilling more
 out of Sir *James's* estate. And as the lady's infestment was record-
 ed before any further advance, she must be preferable *secundo loco*.

For illustrating this point, a competition was supposed betwixt
Dempster and the lady before any more money was advanced; *Demp-*
ster would be ranked *primo loco* for his L. 8000, and the lady *secundo*
loco. Suppose the decret to be extracted, it will not be said that Sir
James could overturn this decree by taking more money from *Demp-*
ster. But is not the lady's infestment equivalent to the supposed de-
 cree of preference? If *Dempster* could only take place of her for
 L. 8000 at the date of her infestment, no posterior deed of Sir *James*
 could deprive her of her place.

The lady's second ground of preference is upon the following
 clause of the act 1696, declaring, “ That any disposition or other
 “ right granted for relief or security of debts to be contracted, shall
 “ be of no force as to debts contracted after the sasine, but prejudice
 “ to the validity of the disposition as to other points.” And here
 the only question is, Whether the whole L. 20,000 was contracted
 at the date of *Dempster's* infestment, or only L. 8000? It is true,
Dempster stood bound to advance the whole if Sir *James* should re-
 quire it. But a promise to lend a horse for a certain use is not *com-*
modatum; neither is a promise to lend money, if it be demanded, a
mutuum: there is no debt established by such a promise. What if
 the backbond had run thus, That Sir *James* should accept of what
Dempster should please to advance, to the extent of L. 20,000? This
 would not have validated the infestment *a principio*, nor have made
 Sir *James* debtor to *Dempster*. And yet there is no difference: a debt
 cannot be contracted without the borrower's consent, more than
 without the lender's.

It

It may be added, that an obligation to lend money is of little significancy to the obligee, as damages, in case of refusal, cannot be ascertained.

The lady concluded with the following observation, that had Sir *James* intended to give *Dempster* an heritable bond, without any consideration or mutual cause; it might be good, if not challengeable upon the bankrupt acts. But the *species facti* is a security for debt, whereof part only was advanced. In such a case the security must be commensurate with the debt due. The case here is different from that where there is an obligation to relieve a man of debts contained in a list, and where the obligant gets an infestment for his security. In that case, the whole debt is contracted at once before infestment is taken; the person infest stands bound to relieve the granter of certain debts.

At advising, *Elcbies* insisted that *George Dempster's* backbond made him debtor to Sir *James Kinloch*; that Sir *James* could assign the backbond; and that the debt therein contained was arrestable by his creditors. *Arniston* and the other Judges were of opinion, that the backbond did not constitute a debt; that no action of debt could lie upon the backbond, but only an action to create a debt, or to lend money; and that, when *Dempster* advanced the money, it was not paying a debt due by him; but on the contrary, it was lending money, and creating a debt.

Accordingly it carried, *Elcbies* only dissenting, that the lady was preferable before *Dempster*, *quoad* the sums advanced after the date of her infestment, both by common law and by statute: by the common law, because a security cannot be without a subsisting debt which is secured; and by the statute, because there was no debt contracted at the date of *Dempster's* failure, except the L. 8000.

N^o CXVI.

16th November 1750.

THOMAS WALLACE *contra* CAMPBELL of *Inveresfragan*.

C O M P E T I T I O N.

ARCHIBALD CAMPBELL vintner in *Inverary*, having built a large inn for promoting his business, obtained from the Duke of *Argyle* a tack, commencing at *Whitsunday* 1740, to endure for three nineteen years, at the old tack-duty of 50 merks. Having contracted considerable debts, and being pressed with diligence, particularly at the instance of *John Somervil* merchant in *Renfrew*, *Campbell* of *Inveresfragan*, his brother, agreed to take off his debts upon getting a proper security; and the only one that could be given was a conveyance to the said tack, with the household-plenishing. The plan concerted was, that *Archibald* should have a subtack for 11 years at a moderate rent, in which time it was hoped that the profits of his business

business might relieve him from his debts; and *Somervil* was brought into the concert, who consented to accept of L. 7 Sterling yearly from *Archibald*, out of the rent to be paid by him to his brother for the sub tack. This tripartite agreement was executed in the following manner: a disposition is granted by *Archibald* to his brother *Inverefragan*, dated 31st October 1741, which, after narrating the several debts above mentioned, extending to the sum of L. 324, 12 s. Sterling, and subsuming that *Inverefragan* had agreed, upon getting the disposition, to relieve the disponent of the said sums, and for that effect to make payment thereof; "therefore, for *Inverefragan*'s further security, and better enabling him to make payment of the "said sums, *Archibald* assigns to him his above-mentioned tack from "the Duke of *Argyle*, with the whole insight and household-plenishing within the same, all specially condescended on in an inventory subjoined to the disposition." Of even date *Inverefragan* grants 11 years sub tack to *Archibald* of the subjects contained in the disposition, at the yearly rent of L. 12 Sterling, whereof L. 7 to be paid to *John Somervil*. And *Archibald*, in order to make this rent effectual, became bound to relieve his brother of the tack-duty of 50 merks payable to the Duke. This transaction was not kept a secret: it was publicly known to the whole town of *Inverary*; and the assignment of the tack to *Inverefragan* was recorded in the sheriff-court books of *Argyle*, 19th November 1741.

In this transaction *Archibald* dealt unfairly by his brother. Beside the said debts, which were reckoned the whole he owed, he was debtor to *Thomas Wallace* merchant, by bills, in no less than L. 100 Sterling, upon which adjudication was deduced in November 1742. In a mails and duties upon this adjudication, *Inverefragan* produced his interest. There was also produced a receipt by *John Somervil* to *Archibald*, of *John*'s part of the sub tack-duty; and as for *Inverefragan*'s part, it appeared to be more than exhausted by an open account of furnishings which *Archibald* made to him. *Inverefragan* insisted for preference upon his assignment to the tack, which was completed according to the nature and intendment of the transaction.

The chief, or rather sole objection to the assignee's preference was, that to allow property to be transferred in this slight manner, without inverting the possession, would be hurtful to commerce; that by such latent rights, creditors may be entrapped, and particularly that *Archibald* might have given assignments to twenty different persons of this tack, in the same manner that he gave it to his brother, without affording opportunity to the assignees to know of one another.

In answer to this objection it was premised, that, by the original law of this land, derived probably from the *Roman* law, it is a maxim, that *nudo consensu rerum dominia non transferuntur*: the property of a moveable is transferred by delivery *de manu in manum*, and of an immoveable by introducing the purchaser into possession. But after subaltern rights upon land came in use, such as real servitudes, securities

securities for money, &c. few of which admitted of natural possession. Symbolical possession came to be established with regard to property itself, as well as all other rights affecting land; after which nothing was more common than to establish real rights, without inverting the natural possession; witness a disposition of property reserving the grantor's liferent, a wadset granted with a back-tack to the proprietor, a disposition in security, an heritable bond, &c. This, it is acknowledged, proved inconvenient for commerce; and therefore, those who had real rights upon land were directed to put their sasines upon record, which is a great security to the lieges.

With regard to *nomina debitorum*, it is probable that originally they were transferred singly by assignment, without the necessity of any other step to complete the transmission; but this being found inconvenient to commerce, a hint was borrowed from symbolical possession in heritable rights, to make intimation to the debtor necessary in order to complete the right in the assignee's person.

As to tacks, there are two methods of completing them, applicable to their different kinds. A tack of land is made real and complete by apprehending the natural possession, until which it remains a personal right; whereby a posterior tack upon which possession is first apprehended, will be preferable. But in a tack which admits not natural possession, such as a tack of mails and duties, intimation to the tenants is the only method for completing the right; and therefore, the tack which is first intimated to the tenants will be preferred; and the same holds in an assignment to such a tack.

The present question is, Whether the sub tack granted by *Inveresk* to his brother *Archibald*, did complete his own assignment to the principle tack, so as *funditus* to denude *Archibald* the cedent, and to bar both his legal and voluntary assignees? This assignment cannot be put upon the footing of a tack of land to be completed by possession; for an obvious reason, that it was an express article in the agreement, to leave the cedent in possession. The apprehending possession then as a means to complete the transference being excluded, there remained no other means but to intimate the assignment to *Archibald* the subtenant, who, by the covenant, was to remain in possession. And that this was the natural way of completing the right, must be evident from considering, that the assignment was in effect no other than an assignment to a tack of mails and duties, at least for the eleven years that *Archibald* was to continue in the natural possession. Had *Archibald*, before he assigned to his brother, sublet the tenement, there cannot be a doubt that an intimation to the subtenant was the proper form of completing the assignment. If so, must not an intimation to *Archibald* himself, who was the subtenant, be held sufficient? It cannot make a difference, that *Archibald* in this case was both cedent and subtenant; such coincidences are not unusual in law, and the case is always understood to

be the same as if there were really two persons, instead of one who sustains the part of both.

The only question that remains is, Whether *Archibald* the tacksmen's assignment to his brother, was not in all views equivalent to an intimation made to him as subtenant? It would be ludicrous to use the form of intimation to the man who is himself the granter of the right.

One of two things must necessarily follow; either the assignment thus known to the debtor, must be a complete right *in suo genere*; or such a transaction, however honest and fair, is ineffectual in law. The latter proposition cannot be maintained, if it be the purpose of law, which it undeniably is, to support and carry into execution every honest and fair transaction. Nothing therefore remains but to acknowledge the truth of the former proposition, viz. that the assignment was complete *in suo genere*, since it was in effect intimated to the subtenant by his being a principal party in the transaction.

Supposing a danger to commerce by such private transactions, it is however the province of this Court to square their decisions by principles of law, leaving consequences to the legislature. At the same time, the danger to commerce is but a bugbear, especially in the case of a tack of an urban tenement, which is merely a personal contract, and not a real right of the lowest kind. Suppose *Archibald Campbell* had sublet his house at L. 20 Sterling yearly, a higher rent than it will bear, an assignment to his brother of the tack intimated to the subtenant, would be a complete conveyance; and yet all this might be kept secret from *Archibald's* creditors. Nor is there any thing here but what occurs daily in the transmission of personal bonds. Creditors, it is true, may be entrapped; but the law must have its course till records be established for personal as well as real rights, if ever such a regulation be found convenient. It is true, that two persons are concerned in these transmissions, the debtor as well as the creditor; which affords greater opportunity of discovering the truth. But if this consideration weigh with the Court, another case shall be put precisely similar to the present. An heritor, who is in the natural possession of his own estate, has a long tack of his teinds for an elusory tack-duty, which he assigns to a third party for an onerous cause. In the *first* place, this assignment needs no intimation, because the only person to whom it can be intimated is the granter himself. In the *next* place, here is a transaction in which as few persons are engaged as in the present. Tacks of teinds may be extreme lucrative rights, and yet whatever danger there may be to commerce, the supposed assignment is a complete right the moment it is delivered. Another example is a wadset, with a back-tack to the heritor, by which a man may be denuded of his estate, and yet matters remain, *quoad* possession, *in statu quo*. The records do not alter the law in this particular, but only put the lieges upon their guard. It is then no principle, that the inverting of possession is necessary for establishing a complete right, whether of
property

property or of tack; and if so, the introduction of records, which are not extended to tacks, cannot vary the argument. The principle of law must stand as it did; and if any argument can be drawn from the records, it can only be, that the records are imperfect by not comprehending tacks.

Mr *Wallace* endeavoured to apply the law regarding base infeftments to this case; and it was asserted, that where lands are disposed, reserving the granter's liferent, the granter's possession, though a quality in the right, is not sufficient to complete the disponee's base infeftment. But it must be extremely obvious, that base infeftments, regulated by the act 105. parl. 1540, have no analogy to the present case, which falls not under the statute, in whatever view it be taken. At the same time, the statute gives no authority for maintaining that the granter's possession, where his liferent is reserved, is not sufficient to complete the disponee's base infeftment; which, in effect, would be maintaining, that a base infeftment, however onerous or honest, is not capable to be made a complete right, where the granter's liferent is reserved. The statute concerns only base infeftments so constituted as that possession may be apprehended; and establishes a presumption of collusion from the forbearing to apprehend possession. But it would be absurd to infer collusion from forbearing to apprehend possession, when, by the very tenor of the transaction, the disponee is barred from the possession. And for this very reason it was found, that a base infeftment is sufficiently completed by the granter's possession, where the liferent is reserved, 16th January 1730, *Barclay of Busbie contra Gemmil*.

"The Court notwithstanding preferred the adjudger to the assignee."

N^o CXVII.

7th November 1750.

JOHN ANDERSON *contra* SHOEMAKERS of Edinburgh.

P R E S C R I P T I O N.

JOHN ANDERSON insisted in a process of spuilzie against the incorporation of shoemakers. The defence was, Lawfully poinded; to which the answer was, That the poinding is null and void, the charge for payment being given in the year 1740, and the poinding was not till the 1745; which, in effect, was poinding without a preceding charge, because a charge falls by the lapse of year and day. This point being controverted by the defenders, it was endeavoured to be made out on the pursuer's part by the following reasoning.

It is a general rule, that no inchoated step of execution does subsist, unless it be followed out within year and day. An execution
of

of a summons falls, if not brought into court within year and day; and even after it is brought into court, it must be awakened, if there be a discontinuance for year and day. A denunciation upon a charge of horning is, after year and day, null and void; and no clerk will record it. For the same reason, a poinding cannot be executed upon a preceding charge of payment after year and day. And the reason of all is, that if a man do not follow out his inchoated execution within a reasonable time, he is understood to have deserted it, so as to afford security to the persons concerned that they are not further to be distressed: and this regulation, founded on humanity, and contributing to the ease and tranquillity of the lieges, ought to be preserved in perpetual observance.

Decisions are not to be expected upon a point which has not been controverted. One thing is certain, that not one man of business but is well acquainted with this regulation, holding that a charge for payment, as well as a charge of horning, fall, if not followed out within year and day. *Spottiswood*, title *Horning*, § 1. lays down the rule as follows: "A person being charged, if year and day pass before intimation, he may not be denounced, otherways the horning is null, and it would seem that the intimation should be upon as many days as the charge." For what other reason should intimation be necessary, but to awaken the debtor from the security he has by the delay of execution, and to make him prepare for payment? It is the very intendment of a charge of horning, that a party may not be surpris'd and catch'd at a disadvantage. Whether intimation be now in use, such as our author talks of, the pursuer cannot take upon him to say; but the authority is equally good whether or not, because still it is unlawful to surpris'e the debtor, and to take him unprepared: the pursuer ought either to have charged *de novo*, or the former charge intimated to him; which comes to the same.

The defender endeavoured to distinguish betwixt the execution of a summons, which is admitted to fall by lapse of year and day, and a charge of horning or a charge for payment. Many an idle process is brought, which the pursuer may well be supposed to relinquish when he does not prosecute his claim within year and day; but the same presumption cannot obtain where a creditor charges upon a registrate bond or bill.

To this it was answered for the pursuer, That this distinction is without foundation. A pursuer is not presumed to relinquish his cause by delaying to bring it into court for year and day; for he may execute *de novo*. But the true reason is, that the lieges are not to be kept for ever in suspense; it is sufficient that the party against whom a summons is executed does attend to the motions of the pursuer for a year and day; after which period the law gives him security till he be roused by a new citation. The reason concludes *a fortiori* to the case of legal execution, which is attended with such consequences, as imprisonment, forfeiture, &c.

It

It was urged, in the second place, by the defenders, that, after a horning is registered, caption may ensue at any distance of time; and that, after denunciation, poinding may proceed at any distance of time.

The first was acknowledged by the pursuer; but, instead of being against him, he urged that it afforded an argument for him: by a registered horning the debtor becomes rebel, and it is in that quality that he suffers imprisonment *in modum pœnæ*; which is so true, that he will not be liberated upon payment of the debt, unless he receive the King's pardon, which is obtained by letters of relaxation. But as for poinding after denunciation, it is doubted whether poinding at all can proceed after denunciation, seeing it is by the creditor's own act and deed that the debtor's moveables are escheated to the King, with the burden of the debt in the horning; the proper step in that case would be to obtain a gift of escheat from the Crown. But whatever be in that, no argument can be drawn from it to the present case; for a debtor denounced rebel can have no cause of complaint for a poinding, however late, seeing the goods poinded do not belong to him, but to the King.

“ The Lords sustained the defence of lawfully poinded; being of
“ opinion, that a charge is a good foundation for a poinding,
“ even after the lapse of year and day.”

The reason which prevailed was, that by the common law, poinding did proceed without a charge, and that the act 4th, parl. 1669, introducing a charge, does not require the charge to be renewed annually. But the sufficiency of this reason may be doubted. It was certainly a defect in the common law, or rather in our practice, that a poinding could proceed without a preceding notification; for the law of humanity requires, that a debtor be put upon his guard before so strong a step be taken as declaring him rebel, or depriving him of his goods; and, to supply this defect, our Legislature made a charge necessary before poinding could proceed; which so far put poinding and denunciation upon the same footing. The statute had no occasion to go further; for the notification once introduced must be subjected to the regulations that govern all notifications, unless the Legislature had determined the contrary, which was far from its view.

N^o CXVIII.

9th November, 1750.

Earl of HOPETON, and others, Creditors of JAMES JOHNSTON, *contra*
NISBET of Dirleton, and ALEXANDER INNES.

B A N K R U P T.

INNES, after the utmost diligence by horning and caption, obtained from *James Johnston* his debtor, an heritable bond of corroboration,
P p p

ration, 17th July 1746. Upon the 16th August following, *James Johnston* was incarcerated at the instance of *Nisbet* of *Dirleton's* factor, with whom the bond was trusted to receive payment. The first notice *Dirleton* had of his debtor's imprisonment, was by a letter from the late Provost *Coutts*, bearing, that he himself was creditor to *Johnston* in a considerable sum; that he was in no pain for his debt, as he knew *Johnston* to be in good circumstances, and therefore begging that *Dirleton* would set him at liberty. *Dirleton* made no difficulty to comply with this request, blaming, at the same time, his factor for his rigorous dealing. Accordingly, upon the 21st of August 1746, *Johnston* was set at liberty; and, of that date, granted to *Dirleton* an heritable bond of corroboration, which he had offered to the factor before his imprisonment.

This imprisonment must have given the alarm to the other creditors, had they entertained any suspicion of their debtor's solvency; but they entertained no more doubt of his solvency than Provost *Coutts* did. After this short interruption, he returned to his shop, and followed out his business as usual, for six months; during which period, he acted in every respect as a man of credit, carrying on his shop-business to as great an extent as ever; and, during this period, there was not the smallest attack upon him, an inhibition excepted, used by a *Glasgow* company, to whom he was indebted L. 74 Sterling. He himself first declared his insolvency, by calling a meeting of his creditors in January or February 1747, laying a scheme before them, in which his debts were stated at L. 1200, and his saleable funds at L. 1100, without including his household furniture. Even after this meeting, *James Johnston* was left in the management of his own affairs till September 1747, that he disposed his real and personal estate to *George Boswell* writer in *Edinburgh*, for behoof of his creditors; who, in spring 1748, assumed the management by placing a factor. At last, in the beginning of the 1749, *James Johnston's* other creditors, finding a considerable shortcoming, brought a process of reduction, on the act 1696, against *Innes* and *Dirleton*, in order to cut down their preference. The libel was, "That *James Johnston*, who " would be found insolvent, ought to be held and reputed a notour " bankrupt from the time of his said imprisonment; and therefore, " that the two heritable bonds granted by him, the one within three- " score days of his bankruptcy, and the other after it, ought to be " reduced." The Court first absolved from the reduction; but they altered this interlocutor upon a review, and found the two bonds reducible upon the act 1696.

The defenders, in a reclaiming petition, set out with an analysis of the statute: and, first, a dyvor or bankrupt, is a man who gives over his business for want of credit or stock, *qui cessit foro*; consequently a man who has credit, and carries on business, cannot be a dyvor or bankrupt. But betwixt these extremes there being several circumstances to make it doubtful whether a man be a bankrupt or not, such as lurking, forcibly defending, &c. it was partly the view of this statute to remove these doubts, and to ascertain the precise

cise intermediate circumstances that should give a man the character of a dyvor or bankrupt. Another view was to extend the remedy against fraudulent or partial alienations. By the law as it formerly stood, such deeds could only be cut down that were granted after actual bankruptcy. The statute 1621 prevented partial preferences after diligence commenced: but this not being a perfect remedy, because debtors, finding themselves in a declining condition, do often lay hold of that opportunity to make up matters with their favourite creditors, the statute 1696 extended the remedy against all deeds granted 60 days before actual bankruptcy. These are clearly the views of the statute; and it is framed to answer these views. After ascertaining those circumstances which should infer notour bankruptcy, and which before were doubtful, it goes on to enact, That, after a man is a notour bankrupt, every deed done during his notour bankruptcy, and 60 days before, shall be void and null. But to cut down such deeds, the man must have the character of bankrupt, without interruption or discontinuance down to the process: the words of the statute holding and reputing the defender to be a notour bankrupt, "from the time of his foresaid imprisonment, retiring, flying, &c." plainly import a commencement of the present bankruptcy, which, from the very idea of commencing or beginning, must infer a continuance in the same state: and the same is implied in the subsequent words, "declaring all and whatsoever voluntary dispositions, &c. made by the foresaid dyvor or bankrupt, either at his becoming bankrupt, or for 60 days before, in favours of creditors, to be void and null."

And this construction arising, both from the nature of the thing and the words of the statute, was found by the Court to be the just construction upon a hearing in presence, in the case of *Agnes Hamilton, Lady Rachan*. The Judges, before the hearing, settled the point in dispute, "Whether a person being once notour bankrupt, in terms of the act 1696, still continues a notour bankrupt by the construction of the act, though the debt in the caption on which he was imprisoned be paid, the caption discharged, and he set at liberty? or whether it be necessary that he continue under diligence, as well as continue insolvent?" The result of the hearing was to find, "That the debt and caption being discharged before the transaction challenged, it fell not under the act 1696."

And indeed to judge otherways would be in effect to maintain, that, if a man have once the misfortune of being a notour bankrupt, no circumstances can ever relieve him from this character; a conclusion contrary both to common sense and to the statute. A trading man becomes bankrupt in the sense of the statute; but, by the assistance of friends, he compounds with his creditors at ten or fifteen shillings *per* pound, and upon payment of the composition, obtains a full discharge from every one of them. Being thus a free man, he begins trade again, and perhaps makes some money, but at
the

the distance of 10, 20, or 30 years, becomes bankrupt a second time. Now, if it would be sufficient to specify that this man was once bankrupt, without necessity of specifying the continuance of the bankruptcy down to the date of the process, the consequence will be, that every single voluntary deed granted from the date of the former bankruptcy, in security or payment to a creditor, must be declared void and null, not only at the instance of prior creditors, but also of creditors whose debts were not existing at the date of the transaction.

“ The Judges adhered. They considered, that as the common
 “ debtor was rendered bankrupt by incarceration in terms of
 “ the statute, the few months in which he was allowed his li-
 “ berty, was no such interruption as to make the posterior fur-
 “ render of his effects be considered as a second bankruptcy.”

N^o CXIX.

9th November, 1750.

ROBERT BARON *contra* The CROWN.

FORFEITURE.

ROBERT BARON, 26th September 1745, sold to Charles Gordon of Tarperfie, some corn and straw, and got a bill of L. 66 Scots for the price. This transaction was after the commencement of the rebellion; but Tarperfie was a loyal subject at the time, though he afterwards joined the rebels. His estate being surveyed for the use of the Crown, Robert Baron put in his claim; to which it was objected, that, by the late vesting act, the estates of those who were attainted of high treason were vested in the Crown as upon the 24th June 1745, and therefore, that the Crown was not liable for any debts contracted after that period.

In answer to this objection it was premised, that it is contrary to common justice to punish one person for the crime of another, a maxim that obtained in the Roman law, not only during the times of liberty, but even after the empire was established, when the punishment of treason was further extended than perhaps in any other country; creditors were safe, and even children, who, notwithstanding the confiscation, had a claim for their legitim.

It may be thought strange at first sight, that the laws of this island should have deviated so much from common justice; but, upon examination, this will not be found a just accusation. When a vassal committed any crime that rendered him incapable to serve his superior, his land returned to his superior, because it was held upon the condition of doing service: and the superior, thus getting possession of his own land, was not liable upon any ground of law to pay the vassal's debts. This was the law even in treason, till it was altered by the statute 25th Edward III. in which it is enacted,
 That,

That, upon forfeiting for treason, the lands shall return to the Crown, not only what are held of the Crown, but what are held of any other subject superior; which was founded upon good policy, because it broke, in some measure, the connection betwixt superiors and their vassals; whereas formerly, the confiscation for treason was nothing where it was committed with the superior's consent. The clan-act, which restored the old law in this particular, was certainly an error against good policy; and therefore is justly abrogated in this particular by a late statute. But this by the way: for it is chiefly to be attended to, that when the King came in place of the superior, with regard to forfeitures for treason, he enjoyed the same privilege which the superior did before him, to be free from the vassal's debts: therefore this regulation was no infringement of the principles of common justice, but what follows from the nature of the feudal holding.

While the superior was understood proprietor, it could be reckoned no hardship that his own land should return to him free, when the vassal proved unable or unwilling to perform the service covenanted. But after the vassal came to be considered as proprietor, which introduced the law-term *dominium utile*, it was certainly unjust to deny creditors a remedy, when their debtor was forfeited of his land; and this was considered as a real grievance for more than a century before the Revolution. The act 33. parl. 1644, "declares "it to be against all equity and reason, that creditors should be prejudged by the forfeiture of their debtors, or vassals, by the forfeiture of their superiors." And the act 33. parl. 1689, "declares "it to be one of the great grievances of this nation, that in the late "times many honest and faithful subjects have been ruined and undone, for other men's crimes and rebellions." And the act 33. parl. 1690, though it afford not a complete remedy to this evil, yet cleaves to the same rule of justice, "That every man should suffer "for his own fault, and not the innocent for the guilty."

These things premised, the claimant proceeded to examine what remedy was afforded to creditors by the treason-law since the Union. By the 1. act 1mo Georgii 1mi appointing commissioners, the estates personal and real of persons forfeited for the rebellion 1715, at any time betwixt the 24th June 1715, and 24th June 1718, are declared to be vested in his Majesty for the use of the public, without having any retrospect. And, to prevent collusion, "declared, that all conveyances and assurances of any real estate, made after the first of "August 1714, by any person attainted as above, shall be deemed "fraudulent." In this statute, debts are not mentioned, nor are they in any shape brought under a legal presumption of fraud. The act 4to Georgii 1mi, vesting the saids estates in trustees, proceeds upon a mistake, as if, by the foresaid statute, the said real estates had been vested in his Majesty from and after the 24th June 1715. But then, as this must have been a forfeiture of all debts contracted thereafter, so far as concerns the said real estates, which was never intended;

tended; there is a saving clause in favour of creditors, who lent their money *bona fide* after the said 24th June 1715, and before committing the treason, that upon proof of their being true debts, they should be sustained.

Now it appears, that the late vesting act is copied from the former of the statutes now mentioned. The real estates are not vested in his Majesty more than the personal, before the actual forfeiture; for the statute has no retrospect. And, to prevent collusive conveyances of real estates, every such conveyance is deemed fraudulent that is granted after the 24th of June 1745, unless the onerous cause be proved. But not a single word of debts, which are left to the provision of the common law. And indeed, had it been the purpose of the statute, to vest in the Crown the real estates *retro*, from the 24th of June 1745, there must have been a clause saving such debts contracted thereafter, as should be proved to be *bona fide* contracted.

The Court was of opinion, that, by the late vesting act, the real estates were vested in the Crown upon the 24th June 1745: and their reason was, *imo*, That it is expressly declared, that every subject belonging to a forfeiting person, 24th June 1745, or that afterward did belong, should be vested in his Majesty; which must mean, that they were to be vested in his Majesty, as upon the 24th June 1745. They observed, that the first vesting act in the time of George I. was in the precise same terms with the present; and that the second vesting act, 4^{to} *Georgii 1^{mi}*, understood it to have the same meaning that is now given to the present vesting act.

“ And upon this ground they cut down *Baron's* claim, as being a
“ debt contracted by *Tarperfie* after his estate was vested in the
“ Crown.”

If this was the intendment of the statute, it ought to have provided for debts contracted after the 24th June 1745, by giving access to prove the true cause, as in the second vesting act of George I. above mentioned. But this was an omission, which no doubt would have been corrected, had there been an application to Parliament. But so few creditors were in the same case with *Baron*, that it was not thought necessary to make the application.

N^o CXX.

29th January 1751.

ANDREW JOHNSTON *contra* HOME of MANDERSTON.

B A N K R U P T.

AALEXANDER HOME of *Manderston*, having become bound as cautioner with and for *Hugh Thomson* to the *British Linen Company* for L. 100 Sterling, by bond dated the 20th July 1747, got,
of

of the same date with the principal bond, a bond of relief by *Hugh Thomson* and *George Burnet* his brother-in-law, in which a brewery and certain houses in *Edinburgh* are made over to him for the security of his relief by *Burnet*, who himself had right to the same by a disposition without infeftment. In *April 1748*, *Manderston* finding that *Burnet* was become bankrupt, took infeftment, by executing the procuratory contained in the disposition by *Burnet's* author to him. And *Thomson* having also failed, *Manderston* paid the debt to the *British Linen Company*, and took an assignment.

Andrew Johnston, creditor to *Burnet* in the sum of *L. 55 Sterling*, by bill dated *January 1747*, insisted in a reduction, upon the act 1696, of the said real security granted by *Burnet* to *Manderston*. And the reason of reduction was, that the defender having taken infeftment after *Burnet's* notour bankruptcy, the disposition in his favours, by a clause in the act 1696, must be considered as of the date of the *sale*, and consequently null and void upon another clause in the act, as being *fictione juris* a security granted to a prior creditor within threescore days of notour bankruptcy. Two answers were made to this reason of reduction; *1mo*, That the clause declaring dispositions, &c. granted by bankrupts, to be reckoned as of the date of the *sale* lawfully taken thereon, does not concern *nova debita*, such as the present is, but only securities granted to prior creditors. *2do*, That the clause does not at any rate relate to the present case, which is a conveyance of a disposition upon which the bankrupt himself never was infeft: whereas the words, as well as the spirit of the clause, regard only subjects in which the bankrupts are infeft.

With respect to the first point, the defender, because of the discrepancy among the decisions of this Court, stated at great length the argument for evincing that the clause does not relate to *nova debita*. It is obvious in the *first* place, that the whole intendment of this statute is to supply the defects of the act 1621, and to complete the remedy, by tying up the lands of bankrupts from acting partially among their creditors. All other acts of ordinary and extraordinary administration are reserved to them: they can levy their rents, and squander the same; they can borrow money, and grant security for the same; nay, they can sell their estates for a just price. Hence, as the plain intention of the statute is, to prevent partiality with regard to creditors, every dark and doubtful clause must be so interpreted as to relate to that case, and not to a case which the statute had not in view, which is that of borrowing money, or of selling land, and which plainly is not reached by any other clause in the statute, if it be reached by this.

In the *second* place, the clause is so conceived, that it is only applicable to securities granted in favour of prior creditors: for it says expressly, that dispositions, heritable bonds, &c. shall only be reckoned to be of the date of the *sale*, as to this case of bankrupt. Now, the circumstance of bankruptcy is of no earthly weight, but singly with regard to securities granted to prior creditors: it is of

no importance in the case of bankruptcy, what is the date of a bond of borrowed money, seeing it is true in law, that a man, even after his notour bankruptcy, may borrow money.

But what the defender principally rests upon is the following consideration, that, if the clause in question be found to relate to *nova debita*, it will have a stronger effect than any person who espouses that interpretation can justify. It must not only cut down heritable bonds for money instantly advanced, where infeftment has been long delayed, but it must cut down every such heritable bond, with regard to real security, where infeftment is taken within threescore days of the bankruptcy, though there be no delay in taking infeftment. The clause makes no distinction whether the infeftment taken be recent or not: it is enacted in general, "That as to the case of bankrupt, all dispositions, heritable bonds, &c. shall be reckoned to be of the date of the sasine lawfully taken thereon." At this rate, an heritable bond granted 61 days before the notour bankruptcy, for money instantly advanced, upon which sasine is taken two days thereafter, must be annulled, at least as to the infeftment: nay, a creditor who lends his money during the running of the threescore days, upon an heritable bond, must lose his preference, though he take his infeftment without delaying an hour; for there must always be some interval betwixt the date of the bond and the date of the sasine. It clearly follows from this argument, that the clause under consideration cannot relate to *nova debita*; for, if it did, no man could have the least security to lend his money to a bankrupt, or for 60 days before the bankruptcy; and yet this consequence was never maintained, nor imagined to be law.

And this opens another view, which is, that unless this clause were intended to prevent the borrowing money, or selling land within threescore days of bankruptcy, which certainly never was intended, it would signify nothing to extend it to *nova debita*. All that this clause enacts is, that the bond shall be of the same date with the sasine: be it so; the bond is still effectual, and the infeftment upon it, unless it can be maintained, that the commerce of borrowing money within threescore days of bankruptcy is discharged. Had such a thing been intended, the Legislature would not have left it to be implied by dark and doubtful inferences. But when the clause is confined to securities granted to creditors, the meaning comes out clear and perspicuous: to declare, that a security granted for a prior debt shall be held of the date of the sasine, is, in other words, to declare, that not only such securities granted within threescore days of the bankruptcy, shall be annulled; but also, that those granted before shall have no preference as real securities, if infeftment be not taken before the threescore days.

To bring *nova debita* under this clause, a sense is given to it, which is very much strained. It signifies nothing to make an original heritable bond to be considered as of the date of the sasine, though

though this is all the statute says : in order to come at a challenge, the heritable bond must be split in two ; the date of the personal obligation is left intire, and the accessory real security is *fictione juris* made to be of the same date with the sasine ; and the bond being thus metamorphosed into a fictitious corroboration, the former clause of the act is made to strike against it, as if it were a security granted for a prior debt. But not to insist upon it, that there is not the least foundation in the clause for this construction, it must be observed that the reasoning is applicable to heritable bonds only, and not to dispositions of land, where the price is paid at the time of the purchase : no slight of hand can convert such a right into a corroboration, when there is no debt subsisting to be corroborated. Will it be said then, that the clause in question was intended only to force a creditor, who has an heritable bond, to take infeftment ? This cannot be, because dispositions and heritable bonds are put upon the same footing : and if it must be admitted, that dispositions in this clause can only mean dispositions granted in security, it must follow that heritable bonds in this clause must also mean heritable bonds granted in security.

With regard to the second point, the defender insisted, that it is evident, both from the words and spirit of the clause, that it only regards deeds granted by bankrupts infeft in their estates. The words are, " Likeas, it is declared, that all dispositions, heritable bonds, or other heritable rights, whereupon infeftment may follow, granted by the foresaid bankrupts, shall only be reckoned as to this case of bankrupt, to be of the date of the sasine lawfully taken thereon, without prejudice to the validity of the said heritable rights as to all other effects, as formerly." Here the words are plain, that such dispositions, heritable bonds, &c. are only comprehended, whereupon infeftment may follow, and upon which sasine can be taken. These can only be dispositions, or heritable bonds, containing procuratories or precepts, where the granter himself is infeft. A conveyance of a disposition, or of an heritable bond, is not a deed upon which infeftment can follow, or which can be the warrant of a sasine ; because such a conveyance never carries either procuratory or precept : the sasine is not taken upon the conveyance, but upon the deed which is conveyed, containing procuratory and precept.

Nor is this construction supported by the spirit more than by the words of the clause. If the clause have any meaning, it must be to compel creditors to take infeftment, in order to put others upon their guard who deal with the debtor, that they may not trust their money upon the faith of what must appear to them a free fund, when it may be preoccupied by heritable securities upon which infeftment may be taken in an instant : Now this view is only applicable to the case where the debtor is infeft, because no man can trust his money upon the faith of a personal right to land in his debtor, which may be qualified by a backbond, or in a hundred different

ways, to render it of very little significancy : but where a debtor is infest in a land estate, people trust him with their money upon the faith of the records, finding there no notification of any incumbrance : and the statute, justly jealous of private deeds betwixt a person in labouring circumstances and his favourites, gives no preference to securities granted by the bankrupt out of his estate, where they are kept latent, and infestment only taken after bankruptcy : But it seems unnecessary to enlarge upon a point which has been solemnly decided in this Court, *January 1734*, Creditors of *Scot of Blair contra Charteris of Amisfield*.

The Judges were unanimous to assilzie from the reduction, but they differed about the *ratio decidendi*. *Arniston* gave it upon this point, that the clause making dispositions as of the date of the sales, relates not to *nova debita*. *Elchies* was of a different opinion, moved principally by the decision 19th *June 1731*, Creditors of *Merchiston contra Colonel Charteris*, but was clear for the defender upon the other point, That *Burnet* was not infest. *Arniston* again upon this point thought it was the same, infest or not infest.

N^o CXXI.

15th February, 1751.

HERITORS of *Humbie contra* KIRK-SESSION.

V A G R A N T.

THE funds for the poor of the parish of *Humbie*, being above L. 7000 *Scots*, were for many years managed solely by the minister of the parish, cloathing his acts and deeds with the specious name of the kirk-session. The heritors, after frequently in vain demanding an account from the minister of his administration, brought a process before the Court of Session, concluding, *1mo*, That the minister and kirk-session should be obliged to give an account of their past management of the poor's funds ; and to this end, to produce in this Court, the record, session-books, and other writs concerning the said funds. *2do*, That the heritors of the parish are entitled, jointly and equally with the minister and kirk-session, to the management and distribution of the poor's funds ; particularly, that of levying sums from one hand, and lending them out to another. The first point was given for the pursuers by the Lord Ordinary, and his interlocutor was acquiesced in. But as to the second and capital point, it was pleaded for the defenders, that the poor's funds are ecclesiastical goods, the management of which belongs to the church and the kirk-session of every parish ; and the Lord Ordinary having found that the heritors have no joint right with the kirk-session in the management, a reclaiming petition, on the part of the pursuers, produced a hearing in presence. The arguments urged for them are what follow.

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In order to form a just notion of our acts and regulations concerning the poor, it is proper to examine what light we can obtain from rational principles. Charity is undoubtedly a moral duty, as well as fidelity or justice; and where the poor are not provided for by law, every particular man stands bound to contribute according to his ability. In christian countries, the principal fund for providing the poor, are the weekly collections at the parish churches: and the poor of every parish being more immediately objects of charity to the parishioners, it came justly to be held a rule, that each parish should maintain its own poor, and that the weekly collections should be applied to the poor within the parish. But this fund being precarious, several acts were made in this country, appointing lists of the poor to be made in every parish, and the heritors and kirk-session to stent the parish for their maintenance. A tax thus imposed, is directly or ultimately a burden upon the land-holder: and accordingly, the maintenance of the poor, by such regulations, resting in effect upon the heritors, it follows from the nature of the thing, that they chiefly ought to have the management and distribution of the poor's funds. If mortified sums, if weekly collections, or any other of the poor's funds fall short by mismanagement, the heritors are the only sufferers, for they must make up all deficiencies. How then can it be doubted, if there be no law to the contrary, that the heritors are intitled to the superintendency of the poor's funds, both as to distribution and management?

At the same time, a distinction ought to be admitted betwixt administration and distribution. With regard to the ordinary course of charity, or even singular cases which cannot bear a delay, the minister alone, an heritor alone, or an elder alone, may give directions. But as to the more solemn acts of administration, which ought to be carried on in a joint meeting, or at least by express deputation, to be submitted afterward to a joint meeting, there can be no occasion for giving exclusive powers to the kirk-session, who have not a peculiar interest, as the heritors have, that the poor's funds be regularly and carefully managed. Every argument that can be drawn from utility, from interest, or from the nature of the thing, lies against such pretensions.

This brings the argument within a narrow compass; and in this light the pretensions of the defenders shall be examined. But first, a view of the statute law must be given; which, instead of supporting these pretensions, will be found to be against them.

It appears clearly to have been adopted into our law, that every parish should maintain its own poor. Accordingly by act 22, parl. 1535, none are allowed to beg except in the parish where they were born: and the headsmen of every parish are directed to give badges to the beggars who are to be supported by the parish, and alms not to be given but to those who have badges. By the act 74, parl. 1579, very judicious regulations are made for the maintenance of the poor:

poor: the management was not trusted to the clergy; but magistrates within burghs, and the judge constituted by the king's commission in every landward parish, are appointed to take up lists of the poor, and the whole inhabitants of the parish are to be taxed for such weekly contribution as shall be thought sufficient to sustain the said poor people, and collectors are yearly to be appointed for ingathering the same. In place of judges in landward parishes named by the king, execution of the above act was intrusted to the kirk-session in every parish, act 272, parl. 1597; and a penalty of L. 20 *Scots* imposed upon every kirk-session as oft as they are found negligent, act, 19, parl. 1600. The preamble of act 38, parl. 1661, is, that the poor have not hitherto been regularly maintained, but have been necessitated to seek their living with hardship and difficulty by scandalous vaguing; which shows that the kirk-sessions had totally neglected their duty. Therefore the management of the poor is intrusted to the justices of peace, who are appointed to take up lists of the poor in every parish, to call for the collections of the parish, or other sums appointed for the maintenance of the poor, to be distributed by them among the inrolled poor, as their necessities shall require. The act 16, parl. 1663, lays the burden upon the heritors of making up lists of the poor, the one half of their maintenance to be paid by the heritors, the other half by the tenants. The act 18, parl. 1672, appoints lists of the poor who cannot work, to be made up in every parish by the heritors, minister and elders; such poor to be maintained by the contributions at the parish kirk, and, the same falling short, to be allowed badges to ask alms within the parish; the poor who can work to be sent to the correction-houses by the heritors who shall cause collect the contributions, and appoint a quarter's allowance to be sent along with them. By a proclamation of privy council, 11th *August* 1692, the said lists are to be made up by the heritors, minister, and elders, who are to liquidate a yearly sum for maintenance; the one half to be paid by the heritors, the other half by the other householders. In this act a penalty of L. 200 *Scots* monthly, *toties quoties*, is imposed upon every parish which fails to maintain its own poor. And there is a further regulation very material to the present point, "That if
 " there be any mortifications already, or if any hereafter shall ac-
 " crue to any parish, the same shall be applied by the advice of the
 " heritors and elders to the use foresaid, but without diminution
 " of the stock of the said mortification." By another proclamation of privy council, 29th *August* 1693, the half of the collections at the church door is to be paid to the heritors, or to any by them appointed, to be applied toward the said maintenance.

The arguments to be drawn from these statutes are obvious. The pursuer shall only suggest one observation in general, which is, that the providing for the poor is a matter of public police, subject to regulations at the direction of the Legislature, as all other matters are that concern the public: far from supposing an inherent power in
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kirk-sessions to manage the poor's funds, every new act contains a different regulation. These acts freely dispose of the weekly collections, of mortified sums, and of other funds appropriated to the poor, and put all under such management as was thought most proper, without at all regarding the kirk-session more than others.

It is very true that the half of the weekly collections are left in the hands of the kirk-session, and not appropriated as part of the constant fund for maintaining the indigent poor. And that this is a wise regulation must be apparent from the following consideration, that, beside providing for the indigent poor, there must be a good deal of occasional charity in every parish, for which there should be a fund: a good workman may break his leg or his arm, and in that event has a demand for occasional charity without being indigent: a man who labours for his bread may die without leaving sufficiency to bury him: upon some occasions it may be proper to assist a decent family out of the poor's box, who would not chuse to be put upon the poor's roll. For these occasions and such like, the half of the weekly collections are left unappropriated in the hands of the kirk-session. But then the acts do not say, nor insinuate, that the kirk-session is to have the uncontrollable management of this fund. It is a fund collected in the parish; and the parish have a right to see it distributed, and to have a vote in the distribution; unless they chuse of their own accord to leave the distribution to the kirk-session, through the good opinion they may have of their management. The kirk-session have not a single argument to urge for this assumed power, if it be not that they happen to be collectors, and that the money is once lodged in their hands: at that rate the overseers appointed by the parish for collecting the poor's rates, might as well pretend to the distribution. This circumstance concludes against them; for it is in every case a bad regulation, that the same person should be both collector and distributor, especially of a precarious fund where there can be no regular check, and where there can lie no precise challenge for mismanagement or misapplication.

But, in opposition to all arguments that can be drawn from our statute-law, and from the nature of the thing, the kirk-session assume a proposition, that the poor's funds are ecclesiastical goods, which it is their province to manage; not only as being an ecclesiastical judicature, but as expressly intitled to this privilege by the act 1592, establishing presbyterian church government; which declares "That
" it appertains to the eldership to take heed, that the word of God
" be purely preached within their bounds, the sacraments rightly
" ministered, discipline entertained, and ecclesiastical goods uncor-
" ruptly distributed;" which act is ratified in the whole heads thereof by the act 5th, parl. 1690. And to fortify this argument they observe, that this constitution is the same with what is laid down in the 6th chapter of the Acts of the Apostles, that the contribution

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for the poor should be under the management of deacons, who are ecclesiastical officers.

In answer to this argument, it may be observed in the *first* place, that the sense of the act 1592, is totally misapprehended. The clause cited does not at all relate to kirk-sessions: their powers are handled in a subsequent clause; and all that is said about them, is in the following words: "Anent particular kirks, gif they be lawfully ruled be sufficient ministry and session, they have power and jurisdiction in their own congregation in matters ecclesiastical." Not a hint of poor's money here, nor even of ecclesiastical goods, supposing the poor's money to be such. The clause cited for the defenders has quite a different sense than what they endeavour to impose upon it: the eldership in this clause is put in direct opposition to the ministers, upon whom they are intended to be a check by the fundamental constitution of presbyterian church-government: therefore it is declared to pertain to them, that the word of God be purely preached within their bounds, the sacraments rightly ministered, and discipline entertained. And as at that period the reformed clergy had, for the most part, neither regular stipends nor parishes, but depended, in a good measure, for their living upon voluntary contributions; therefore it is declared to be also the province of the eldership, that ecclesiastical goods should be uncorruptly distributed, that is, among the ministers preaching the word of God who were not otherways competently provided. Whether this be a just interpretation of the clause, will best appear from a thorough knowledge of the history and circumstances of these times. But one thing is extremely evident from the statute itself, without the aid of history, that by the eldership in this clause, is meant the whole body of the laic elders, in opposition to the ministers or clergy, and by no means the kirk-session; and therefore at any rate, that this clause gives no privilege to kirk-sessions to manage the poor's funds.

In the *second* place, the pursuers can find no ground for classing the poor's funds under ecclesiastical goods. Is it because charity is a christian virtue or duty? But so is justice, performing promises, payment of debts, abstaining from crimes, &c. At this rate all jurisdiction, civil and criminal, ought to center in the kirk-session, as well as the administration of charitable funds. But supposing charity to be in some peculiar manner a christian duty, does it follow that charity-funds are to be understood as ecclesiastical goods, and to be under the management of the clergy? This is too wide a step to be relished by protestants; though, in many instances, as slight a connexion has been sufficient for the popish clergy to draw very extensive consequences from. For example: being generally employed about dying persons, they consider it as their privilege to see last wills and testaments executed; and where there was no testament,

testament, they also assumed the privilege to oversee the distribution of the effects of persons deceased, among their nearest relations. What at first was considered as advice only, was converted in process of time to a right of distribution, and from that at last to a right of property; at least of distribution unaccountable, which in effect comes to the same thing. Words were put in place of things, in that case; and so they are in the present argument: because charity is a christian virtue, therefore, charity-funds must be christian or ecclesiastical funds; and because, by a stretch, they may bear that name, therefore they must be under the management of the clergy, or of the kirk-session. This legerdemain reasoning may pass in superstitious times, but never in days of liberty and freedom of thought. And there is the more reason to oppose this very singular doctrine in its infancy, because it may have deeper consequences than the defenders at present think proper to adopt. Willing at present to soften matters, they yield to a review of their management in this court, by way of process. But if their exclusive privilege of managing the poor's funds gain once a firm establishment by practice and the authority of this Court, the heritors will be told that the kirk-session are not accountable for their management of the poor's funds, more than the popish clergy were for the management of the goods of those who died intestate; at least, if they are accountable, that it can only be before their own church judicatures, as being a matter purely ecclesiastical.

And in the *last* place, whatever be the construction of the act 1592, which was abrogated, and afterwards revived by the act 1690, it certainly could never be the meaning of the act 1690, to revive that statute further than as it concerned presbyterian church-government, by assemblies, synods, presbyteries, and kirk-sessions. It was never meant by any general clause, of reviving "it in the whole heads thereof," to rescind at one blow the whole statute-law concerning the maintenance of the poor. Among others, the act 18, parl. 1672, was at that time in force, giving power to the heritors, in conjunction with the kirk-session, to apply the weekly collections partly to the infirm poor within the parish, and partly to support those who were sent to correction-houses. And therefore, one of two things must be admitted, either that the act 1592 was not revived as to the management of the poor's funds, or that it did not relate to that management. And that this really is the true interpretation of the statute 1592, does not only appear from the act 1690, considered in the light now mentioned, but more directly from the subsequent proclamations of the privy council. Had it been understood, that by the act 1690 reviving the act 1592, in the whole heads thereof, an exclusive privilege was given to the kirk-sessions to manage the poor's funds, the privy council would never have taken upon them to transgress the public law, by appointing first the management of mortified sums to be in the joint body of the heritors, minister, and elders; and next, that the half of the weekly collections

lections should be accounted for to the heritors, for maintenance of their indigent poor.

The defenders in vain endeavour to support their argument with the authority of the Apostles, which is most express against them. The Apostles, far from considering it as a privilege to have the distribution of the poor's funds, did remonstrate against it, and directed the brethren to chuse seven of their own number for this management; which was accordingly done, and *Stephen*, with six others, were chosen. The Apostles upon this occasion took the opportunity to declare it unreasonable, "that they should leave the word, "and serve tables; but that it was their province to give themselves "continually to prayer, and to the ministry of the word." Matters, it would appear, are now wonderfully changed: the kirk-session of *Humbie*, upon what account they know best, claim that as a privilege, which the Apostles considered as an unreasonable burden; and show themselves more willing to have the fingering of money, than to give themselves continually to prayer and to the ministry of the word.

At the same time it must be owned, that this text can have no great weight either way: an interim regulation with regard to unsettled times, can never, by any good reasoning, be drawn as authoritative with regard to an established constitution, where the circumstances vary in every respect. Nor, in general, can we suppose that the Apostles, in propagating the Christian religion, ever intended to break in upon the police of any government with regard to matters purely civil, like the present; or to establish rules of government to be strictly observed by all those who adopted Christianity. It is absurd to maintain such a proposition: the form of civil government and all things that fall under it, are left free to the legislature in every country to be regulated as they see most convenient: these are matters which Christianity does not encroach upon.

And to show that we never had any notion of this new invented popish doctrine, for it may well bear that name; when we look into the acts of the town-council of *Edinburgh*, the capital of the kingdom, which no doubt were a pattern for the other boroughs, we find the magistrates, ever since the Reformation, taking upon them the management of the poor and of the poor's funds. Nay, they go so far as, by acts of the town-council, to regulate the constituent members of the kirk-sessions, to appoint the deacons and elders to be chosen by the town-council, and to declare the magistrates to be constituent members of every kirk-session. Further, the town-council elects the kirk-treasurer, an officer who has long been in use, and whose province it is to collect the weekly contributions, and to distribute the same by appointment of the magistrates.

With regard to the present case in particular, it is a matter which deserves well to be considered, whether it be expedient or safe to trust so great a fund in the hands of a kirk-treasurer, chosen *ad libitum* by the minister, without finding caution. A sum of L. 7000 or

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L. 8000, all in bonded money, which may be uplifted in one day, is a violent temptation for a poor man to retire with the money out of the country. In that case, the minister and kirk-session would think it hard to be made liable; possibly, there is no law to make them liable, and probably it might turn to little account were there such a law.

“ Found, That the heritors have a joint right and power with the
 “ kirk-session, in the management and distribution of all and
 “ every of the funds belonging to the poor of the parish, as well
 “ collections as sums mortified for the use of the poor, and money
 “ stocked out upon interest, and have right to be present
 “ and join with the session in their administration, distribution,
 “ and employing such sums; without prejudice to the kirk-session,
 “ to proceed in their ordinary acts of administration and
 “ application of their collections to their ordinary and incidental
 “ charities, though the heritors be not present nor attend. But for the
 “ better preventing the misapplication or embezzlement of the funds
 “ belonging to the poor, found,
 “ That when any acts of extraordinary administration, such as the
 “ levying bonded money, or lending or re-employing the same, shall
 “ occur, the minister ought to intimate from the pulpit a meeting for
 “ taking such matters under consideration, at least ten days before
 “ holding of the meeting, that the heritors may have opportunity to
 “ be present and assist, if they think fit.”

N^o CXXII.

22d February 1751.

ELIZABETH SOMERVILE *contra* GEORGE BELL.

H U S B A N D and W I F E.

JOHN FORRESTER of the island of *Jamaica*, had it long in view to make his addresses to *Elizabeth Somerville*, so soon as his circumstances should permit him to marry. One of his letters to her dated in *March* 1739, has the following paragraph: “ I’ll settle upon
 “ you, in case of death, L. 100 Sterling *per annum*, to be paid upon
 “ the Exchange of *London*. As to your own fortune, I want none,
 “ nor did I ever court you with that view; if you have a mind to
 “ give it to any of your relations, I’ll with all my heart consent, for
 “ I thank God I do not want it. I’ll take care to support you as
 “ well as your dear heart can wish. As to your jointure, it shall be
 “ preferable to any sister you have, &c.” In the year 1743, Mr *Forrester*
 came home, and the marriage was celebrated 27th *December* that year,
 but without the formality of a marriage-contract. Being upon death-bed,
April 1744, and without the least prospect of recovery, he executed a deed,
 which became a subject of dispute in the

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Court of Session. It proceeds upon the narrative, "That there was
 " no contract of marriage, but only some verbal conditions; there-
 " fore, in execution of his just intentions, he becomes bound to pay
 " the sum of L. 666 : 13 : 4 Sterling, to his spouse in liferent, and to
 " the children to be procreated of the marriage in fee; whom fail-
 " ing, to his spouse, her heirs and assignees. This sum is declared
 " to be in place of her legal provisions." The deed farther con-
 tains a legacy to her of the household-plenishing; and lastly, bears
 a dispensation with the delivery. What was expected happened,
 for Mr *Forrester* did not survive this deed three days, and he left no
 child.

It came to be disputed betwixt the relict and the nearest of kin,
 whether this deed was to be considered as granted *intuitu matrimonii*,
 and to fall, as the marriage did not subsist year and day; or *intuitu*
mortis, and thereby to be effectual as a legacy, or *mortis causa dona-*
tio. The Lord Ordinary having given it the former construction,
 the relict reclaimed upon the following grounds: *1mo*, That this
 heteroclite practice of annulling marriage-contracts, when the mar-
 riage does not subsist year and day, can have no other foundation
 but an implied consent of parties; and supposing such consent to be
 implied in post-nuptial, as well as in ante-nuptial contracts, the cir-
 cumstances of this case afford real evidence, that Mr *Forrester* in-
 tended the deed to be effectual, though he should die the next day.
 The deed bears date the 28th *April*; the year and day did not elapse
 till the 27th of *December*; the granter was given over by his phy-
 sicians, and died a few days thereafter: can we admit of so absurd a
 supposition, as that he intended the deed should be null, unless he
 lived eight months, when he had not a prospect of living eight
 days?

2do, The deed in question is not a contract of marriage, ante-
 nuptial, nor post-nuptial. It is a legacy or *donatio mortis causa*, the
 characteristic of which is to be effectual at the granter's death, and
 not before. It is not a mutual contract, which is the character of
 a contract of marriage; it contains no obligation upon the lady;
 but is altogether in her favours, and bears expressly "to be in exe-
 " cution of his just intentions, and of some verbal conditions agreed
 " upon at the time of the marriage." And what these intentions
 were, appears from his missive letter above set forth. And that this
 was meant *a donatio mortis causa*, is proved beyond doubt by the
 clause dispensing with the delivery: this clause is legal evidence that
 Mr *Forrester* intended to keep this deed in his own hands, and conse-
 quently under his own power. With regard to such a deed, it is
 really absurd to imply an irritancy in case the marriage did not sub-
 sist year and day: an irritancy, from the very nature of the thing,
 presupposes that the deed is binding, and that it is to be effectual in
 case the irritancy be not incurred: what use can there be to stipu-
 late an irritancy, or to suppose such a thing intended, in a deed
 which the granter keeps entirely in his own power?

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“ The Lords adhered by a very narrow plurality. The President
 “ was clear for the relict upon this footing, That a deed *mortis*
 “ *causa* retained in the granter’s hands, and under his power;
 “ to be effectual upon his death, is inconsistent with the suppo-
 “ sition of any irritancy.”

N^o CXXIII.

12th June 1751.

SAMUEL FULLARTON *contra* CREDITORS of CARLETON.

D E B T O R and C R E D I T O R.

CAPTAIN *Hugh Fullarton* of *Carleton*, proprietor of the land of *Carleton*, and of houses and borough-acres in and about the town of *Kirkcudbright*, borrowed from *James Murray* 3000 merks, and gave him a real security upon the said houses and acres, in which the creditor was infeft April 1724. In April 1726, Captain *Hugh Fullarton* executed a disposition in favour of his second son *Samuel*, of the said houses and acres, upon the narrative of it’s being a patrimony or portion to him. The granter’s liferent is reserved, and the subjects disposed are warranted “ to be free, safe, and sure from all
 “ perils, dangers, and incumbrances whatever.” *Samuel* was infeft upon this disposition, April 1726. *James Murray* deduced an adjudication anno 1732, not only of the subjects contained in his heritable bond, but also of the estate of *Carleton*.

After the Captain’s death, his eldest son *John* succeeded to his estate; and he, without making up titles, having added to his father’s debts his own contractions, the creditors, upon the medium of special charges, proceeded to adjudge not only the estate of *Carleton*, but also the said houses and acres, which were understood to be *in hæreditate jacente* of the Captain.

A sale being raised, *Samuel Fullarton* appeared in the ranking, and observing that *Murray* was ranked *primo loco* upon the houses and acres, insisted, that if *Murray* chose to draw his payment out of these subjects, he ought to assign his adjudication, in order that *Samuel* might draw out of the estate of *Carleton*, whatever should be drawn out of his own estate by virtue of the heritable bond.

“ It carried by a plurality, that *Samuel*, to whom the houses and
 “ acres were disposed with absolute warrandice, was for that
 “ reason intitled to the assignment demanded.”

The matter was considered in the following light: That *Samuel Fullarton* was in effect cautioner in *Murray*’s debt; and therefore, that the adjudication led by *Murray* was to be considered as a security for *Samuel* the cautioner, as well as for himself, and that *Samuel*, upon payment out of his subject, was intitled to demand from the creditor an assignment to his debt and diligence.

N^o CXXIV.

N^o CXXIV.

12th June 1751.

GEORGE TURNBULL of *Houndwood*, contra Sir JOHN STEWART of *Allanbank*, and Mr ARCHIBALD INGLIS Advocate.

A S S I G N A T I O N.

SIR *Archibald Cockburn* of *Langton* having become bankrupt upward of 50 years ago, his estate was put under sequestration, and a ranking ensued of his creditors, which was carried on in a slovenly manner, and the lands were never brought to sale. His son, the late Sir *Alexander*, while a young man, acquired considerable funds of his own, entered heir *cum beneficio*, and made it his business to pick up as many preferable debts as he could purchase at easy rates, and to take the conveyances in his son *Archibald's* name; for, in those days, it was reckoned hazardous to take them in his own name, as he was heir *cum beneficio*. Among other debts, there was one of L. 1000 Sterling due to *John Wardlaw* by heritable bond and infestment, which Sir *Alexander* acquired, and took the conveyance as usual in the name of his son *Archibald*.

In the latter end of his life, Sir *Alexander* came to decline in his circumstances; and as he had laid out his whole stock upon purchasing preferable debts, he had no fund for satisfying his proper creditors, but by assigning to them debts, or parcels of debts, purchased by him. Being pressed about the year 1723, by the Society for propagating Christian knowledge, he assigned to that Society several preferable debts upon the estate of *Langton*, settled as aforesaid in his son *Archibald's* person; and, among others, the debt originally due to *John Wardlaw*. But, as the Society had sufficient security *aliunde*, the interest due upon *Wardlaw's* debt preceding *Martinmas* 1723, was held by the Society in trust for Sir *Alexander* and *Archibald Cockburns*.

George Turnbull of *Houndwood* came to be engaged for the family of *Langton*, in debts above L. 700 Sterling; and for his relief got an assignment of the said bygone interest of *Wardlaw's* bond. The deed is executed in the following manner: Sir *Alexander* and his son *Archibald* bind themselves, conjunctly and severally, to relieve *Turnbull* of his several engagements for them; and for his relief, *Archibald* assigns to him the said bygone interest. This transaction was in the year 1730; and in *April* 1732, the Society retroceded Sir *Alexander* to the said bygone interest, by granting a conveyance in the name of his son *Archibald*.

Notwithstanding this assignment, Sir *Alexander* and *Archibald*, pressed with diligence by *Patrick Crawford* merchant in *Edinburgh*, ventured to do an unwarrantable act, which was to assign a second time this very bygone interest to *Patrick Crawford* for his security.

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The assignment bears date the 18th May 1732, subscribed by *Archibald*, who was nominally in the right.

These several claims being produced in the ranking of the creditors of *Langton*, preference was claimed by Sir *John* and Sir *James Stewarts*, and Mr *Archibald Inglis*, who had acquired right to *Patrick Crawford's* claim, upon the following ground; that though the assignment to *Turnbull* was prior in date, yet, that their assignment was first intimated and completed, *viz.* by a poinding of the ground, being the only step which could be taken to complete their right, seeing the assignment to the bygone interest of the heritable bond is not capable of infestment. *Turnbull*, on the other hand, contended, that he had the first completed right to this bygone interest, seeing his assignment was sufficiently intimated to the debtor, Sir *Alexander Cockburn*, who is one of the granters of that very deed in which the assignment is contained, and likewise tenant and possessor of the lands out of which the said interest is to be levied, and which therefore was as full an intimation to him as any formal intimation can be by a notary and two witnesses.

Turnbull, to clear his preference, applied himself to make out two propositions, 1^{mo}, That the deed in his favours is equivalent to an intimation. And, 2^{do}, That an intimation in this case, as well as in the common case of an assignment to a personal bond, completes the conveyance, and puts it out of the power of the cedent to grant a second assignment.

With respect to the *first* point, it was premised, that Sir *Alexander* was entered heir to his father Sir *Archibald*, consequently came to be liable personally to the debt in question due by Sir *Archibald* to *Wardlaw*. It is true, he entered *cum beneficio*; but this makes no difference; for an heir *cum beneficio* is universally liable for his predecessor's debts, and may be decerned accordingly: only he has a privilege, if he please to use it, which protects his person and proper estate from being liable *ultra valorem*. At any rate, an intimation to an heir *cum beneficio* completes the conveyance, equally as an intimation to an heir who enters without inventory. The only question then is, Whether the deed under consideration be equivalent to an intimation? Sir *Alexander* and *Archibald* bind themselves, conjunctly and severally, to relieve *Turnbull*; and *Archibald* in the same deed is made to convey the bygone interest in question for *Turnbull's* relief. All the debts were purchased by Sir *Alexander*, and taken in *Archibald's* name, who was his presumptive heir, merely because it was not reckoned safe that Sir *Alexander* should take these debts in his own name: *Archibald's* conveyance, therefore, was really Sir *Alexander's* conveyance. But, dropping this circumstance, Sir *Alexander* knew of this conveyance, and his knowledge is made out by the deed of conveyance itself. Is not this equivalent to a formal intimation? And, after all, what more formal intimation than to make the debtor party to the deed of conveyance. In place of all other authority, a decision in point was referred to, compiled by

Forbes, 28th March 1707, Competition, *Creditors of Lord Ballenden*; the case of which was this: In a competition for a lady's life-rent annuity, some of her second husband's creditors having assignments thereto duly intimated, and another producing a bond granted to him by the said second husband, containing an assignment to the same annuity in security of the sum in the bond, which bond and assignment were prior in date to the intimations of the other assignments; the Court preferred this assignee, and found no need of any other intimation, but the subscription of the heir of the first husband to the deed, which sufficiently supplied a formal intimation to him.

With regard to the *second* point, the difficulty was, that it is not by intimation to the debtor that the preference of real rights is to be determined, but by infeftment, where the subject is capable of it, or by real execution of poinding the ground where there can be no infeftment, as in the present case. In answer to this difficulty, it was observed, that, in transmitting rights, there are different forms used in order to complete the transmission: intimation to the debtor makes a complete transmission in personal rights: in real rights passing by infeftment, the real right is not vested in the assignee till he take infeftment. The subject under consideration, *viz.* the bygone interest of an heritable bond, is of a middle nature: the subject is not conveyable by infeftment, and though a moveable subject, it is notwithstanding secured upon land. The question is, What is the proper form for completing the transmission of such a right? This question admits of an easy solution, by putting a plain case: a creditor infeft upon an heritable bond makes a conveyance of the bygone interest, and the assignment is intimated to the debtor who enters upon payment; will not the debtor be secure, so far as he pays, to afford him a defence against a second assignee, who has a process of poinding the ground? There seems to be no doubt, unless we maintain this absurd proposition, that an assignee to such interest cannot claim payment by a personal action, nor even take voluntary payment, but must in all cases raise a poinding of the ground. And there seems to be as little doubt of the consequence, that the assignee's right must be fully established by the personal intimation, otherways the payment made to him will not be available; for it is a general rule, that wherever an assignee is in such a situation as to be able to force payment from the debtor by a personal action, the transmission must be complete in his person. It was further observed for *Turnbull*, that, in this view of the matter, the very point urged for his parties, pleads for him. They insist upon a poinding of the ground, as the only proper step for completing the conveyance. Now, in a poinding the ground, the debtor is the principal person called: the conclusion being, "That because of
" his failure of payment, the goods that belong to him upon the
" ground, and his tenants goods to the extent of the rent, should
" be poinded for payment; and, so far as these are not sufficient,
" that the ground-right and property itself should be poinded and
" apprised."

“apprised.” From the nature of this execution, it is evident, that there is an order of discussion, *imo*, That the debtor should pay: *2do*, Failing of his payment, that his goods and his tenants rents should be made liable; and *last* of all, that the land should be made liable. It follows then, that real diligence against the land cannot proceed properly till the debtor’s moveables be discussed; and as this is the last step in the order of execution, it must be the personal intimation that completes the transmission, and intitles the assignee, *first*, to demand payment from the debtor by a personal action; *then* to poind his moveables just as in common poindings; and, *last* of all, to poind and apprise his land. And, at bottom, this execution upon real debts does not vary from the common execution upon personal debts, except in the following particular, that a clause of registration, which is a sufficient foundation for other execution without a process, has not been reckoned sufficient for a poinding of the ground, which makes a process necessary to authorise that execution.

“Found, That the assignment to *Turnbull*, being contained in the
 “same deed with the obligation granted by Sir *Alexander* and
 “*Archibald Cockburns* to him, was thereby sufficiently notified
 “to Sir *Alexander*, and made a formal intimation unnecessary;
 “and therefore *Turnbull* was preferred.”

N^o CXXV.

16th July, 1757.

Mrs MARY STEWART and her Husband, *contra* ALEXANDER Lord
Lindores.

E X E C U T O R.

IN the year 1721, *Alexander Stewart*, son to Lady *Lindores* by her first husband, having right from his mother to a provision of 10,000 merks contained in her contract of marriage with *David Lord Lindores*, her second husband, brought a process against Sir *Alexander Anstruther*, who succeeded to the estate of *Lindores* by a deed of settlement, for payment of this sum. Sir *Alexander* granted an heritable bond of corroboration; and having thereafter sold the estate to the present Lord *Lindores*, took the purchaser bound to relieve him of this among other debts.

The representatives of *Alexander Stewart* brought a process *anno* 1743, against the present Lord *Lindores*, founding upon the said clause of relief, and concluding, that he ought to pay this sum. The defence was, that the Lady *Lindores* being confirmed executrix to her husband *David Lord Lindores*, got his moveables appraised at very small values: that she sold these moveables at a higher value than they were appraised at; and that the pursuers in her right were accountable for the balance. The Lord Ordinary, before answer, directed

directed a proof of the value of the moveables confirmed; and having advised the proof, found, "That there is no evidence of the extent of the alleged mal-appretiation, upon which any certain judgment can be formed; and found, that as no objection was made to the debt, till it was made in this process, more than twenty years after it was corroborated by Sir *Alexander Anstruther*, there lies no presumption against the pursuers, that any inventory or roup-roll of the effects confirmed has been suppressed in order to conceal the truth; and therefore repelled the defence." But the Lords, upon a reclaiming petition and answers, found, "That there is sufficient evidence brought upon the part of the defender, that the value of the stock and crop was 7000 merks, and remitted to the Ordinary to proceed accordingly."

The pursuers, in reclaiming, found it necessary to state the precise facts. *David Lord Lindores* having died in July 1719, his relict paid the funeral expences, servants fees, and several other pressing debts, obtained a decree *cognitionis causa* before the commissary, for L. 2899 : 17 : 8 *Scots*, upon which she confirmed her husband's stocking and growing corns, 9th September 1719. In this situation, nothing else could be done; but, from the different grains sown, to estimate what might be the produce, and what might be a reasonable price for that produce. It is the duty indeed of an executor, in this case, to bring the corns, after they are threshed out, into a regular account; but the executrix died in October 1719, before that could be done. At this period, there is no suspicion that any of the subjects confirmed were sold or disposed of: For as the lady continued her husband's possession, to which she had right by her liferent-infeftment, the stocking was necessary for carrying on the management of the farm.

The corns and stocking, by this means, remained still in *hereditate jacente* of Lord *Lindores*, and lay open to a new confirmation *ad non executam*: For as an executor is but a trustee, the confirmation transfers not the property to him, but only completes the power given him by the commissaries to ingather the defunct's effects, convert them into money, and distribute the same among those having interest. Now, if the Lady *Invernytie*, who was his Lordship's next of kin, forbore to apply for a confirmation *ad non executam* for her own behoof, and for behoof of all concerned, the Lady *Lindores's* representatives were certainly not to blame for want of diligence, because her office died with herself. If they who had interest in his Lordship's executry were not pleased to interpose, the representatives of Lady *Lindores* could do no other than take possession of the confirmed goods, and dispose of the same for their own behoof. They, as representing Lady *Lindores*, had an obvious interest to act this part; because, in all events, the lady became liable for the apprised sums, though every hoof should have perished; and therefore had a title to take possession of these goods, to answer for the apprised values, if no other person was pleased to interpose.

This

This being the true state of the case, it is submitted, whether any action can ly against the representatives of the executrix, for any benefit they may be supposed to have made by this their intromission, at the instance of a creditor, or the next of kin, or any other person concerned in the executry. There appears to be no foundation for such an action, either at common law, or in equity. The remedy at common law is that suggested above, *viz.* a confirmation *ad non executam*, or of *male appretiata*; and if this remedy be neglected, why should another be created without necessity, especially where it, in a good measure, contradicts the principles of equity? That it does so, will appear from this single consideration, that though the goods should sell at an under value, or perish *casu fortuito*, the executor is, notwithstanding, liable for the appraised values, which is the legal charge against him; and therefore, to make him answerable for the profit he has by the effects confirmed, is making him run all the hazard, without the least prospect of advantage, contrary to the known maxim of equity, *cujus incommodum, ejus debet esse commodum*. At this rate, a confirmation, *ad non executam*, or *male appretiata*, is a very foolish invention: better for the creditors, or others interested in the executry, to ly upon the catch till the goods be disposed of: if the market-price run high, they have all the benefit; and however low it may be, they are at no loss; the appraised values must, in that case, be the rule. But our forefathers judged more equitably: to prevent playing tricks by low appraisements, they invented the confirmation *ad male appretiata*, which is a most equitable remedy, by giving the principal executor the full value of the goods as stated in his own testament, and with all relieving him of all further hazard and trouble. The principal executor can have no cause of complaint, and the executor *ad male appretiata*, who thus undertakes the burden of the management, has a chance of profit by disposing of them at higher values. A third party may no doubt come in, and bid upon him by a second confirmation *ad male appretiata*; but if the parties concerned forbear till all the effects be disposed of, it is then too late for the application: there can be no such thing as a confirmation *ad male appretiata* after the effects are sold and converted into money, more than for a confirmation *ad non executam*.

The sum is, that Lady *Lindores* herself, who was guilty of no negligence, could not be made liable to account for any greater sums than those contained in her confirmed testament, seeing she died before having an opportunity of converting these effects into money. *2do*, When those concerned in the executry neither took out a confirmation *ad non executam*, nor *male appretiata*, but allowed the Lady's representatives to dispose of the goods, which they were entitled to do as being liable for the appraised values, there was no place thereafter for such confirmations; *3tio*, much less for an irregular application by a process that has no foundation at common law; and as little in equity, after neglecting the ordinary remedy. And *lastly*,

X x x

If

If such a claim cannot be made by way of action, as little by way of exception, as in the present case.

“ The petition for the pursuers was refused without answers.”

The Court thought it competent to claim the surplus value of the subjects confirmed by way of defence, though there be no confirmation *ad non executam*; and they did not regard the distance of time, which must rest upon the following ground, that an executor-creditor, like an executor-dative, is a trustee only; consequently, that he is not subjected to the risk of the goods perishing, or of their falling below the appraised values; but that he is bound to dispose upon them by auction, and to account for the price, deducting only the debt due to himself; and that his representatives are liable in the same manner.

Nº CXXVI.

19th November 1751.

DAVID MALLOCH *contra* the WIFE and CHILDREN of *Fulton*.

C E S S I O B O N O R U M .

DAVID MALLOCH, officer of excise, being tried before the Court of Justiciary for the murder of *John Fulton*, was found guilty, and sentence of death was pronounced against him. Having obtained the King's pardon, the same was presented to the Court of Justiciary, and admitted in common form. But an application having been made to the Court for an assythment, at the instance of the relict and children of the deceased, *David Malloch* was appointed to be carried from the bar to the castle of *Edinburgh*, there to remain till he should find caution for the assythment. And, in the same interlocutor, there was a remit to the Barons of Exchequer, to modify the assythment. The Barons having modified L. 100 *Sterling*, without regard to the prisoner's circumstances, he was forced to bring a *cessio bonorum* against all his creditors. The relict and children appeared, and proponed the following defence: That the process of *cessio bonorum* is not competent against them as creditors for the assythment. The point being new, produced a hearing in presence; and an interlocutor was given, finding, That the process of *cessio bonorum* cannot take place against a claim of assythment. The pursuer reclaimed, and insisted upon the following topics.

Personal execution in our law rests upon no other foundation, but the jealousy the law entertains of concealment; and the sole purpose of it is to force the debtor, *squalore carceris*, to make a full discovery of his effects. This is the very language of Lord *Stair*, B. iv. tit. 52. § 31. of his Institutions; whence it appears to be a necessary consequence, that if upon trial taken, it be found, that there is no concealment,

cealment, but that the prisoner is really bankrupt and unable to pay his debts, he must of course be entitled to his personal liberty. The *cessio bonorum*, therefore, is a remedy at common law, arising from the very nature of personal execution; and accordingly it appears to be of a very old standing, mention being made of it in our oldest law-books as a known and established remedy; for which see *Quon. Attach. c. 7. St. King William, c. 17.* Hence liberation, in this case, is not to be put upon the footing of compassion, which the Judges may listen to or not, according to circumstances. Imprisonment *per modum pænæ* stands by itself; but every man who is detained in prison for no other cause but inability to perform his engagements, is entitled to be liberated upon the principles of common law.

And here it must be observed, that all the arguments drawn from the *Roman* law to this case, are misapplied. By the law of the *Romans*, the person of the debtor was subjected, like his effects, to execution: he became the creditor's property if he had not other effects to satisfy: he could be sold like any other slave; and nothing was more common, in the early ages of the republic, than to detain a debtor *in privato carcere*, and to whip and torture him, upon the slightest surmise of concealment. This severe law, fit only for a barbarous age, lost its force gradually as manners improved, though it was never formally abrogated. The *cessio bonorum* among the *Romans*, was one of the remedies invented to soften the rigour of their common law; which therefore, in its beginnings, was only admitted where the circumstances were favourable: though afterwards gaining strength by degrees it was more easily indulged. But still being a remedy contrary to the common law, it is no wonder that distinctions were made, and the privilege refused where personal objections lay against the prisoner of any weight.

But to show that our law stands upon a very different footing, the act 5. parl. 1696, is appealed to, discharging to dispense with the dyvor habit, except in the case of innocent misfortune liquidly libelled and proved. Hence it is no good defence against the *cessio bonorum*, that the prisoner was a squanderer, and entrapped creditors by borrowing money after he knew himself to be bankrupt, though these facts are undoubtedly criminal. These facts might subject the criminal to wear the dyvor habit, but they could afford no good defence against the *cessio bonorum*. And so says Lord *Stair*, book iv. tit. 52. § 34, speaking of the dyvor habit: "The reason of which severity is to deter decoctors who lavishly spend their estates, and continue trade when they know themselves absolutely broken. And therefor the law exemts some from wearing this habit, upon their proper knowledge or famous testificates, that they became poor without such faults." And indeed, from the nature of the thing, such transgressions are not to be regarded in a *cessio bonorum*: these transgressions may produce criminal proceedings, which is a separate matter; but where a man stands imprisoned for failing to pay

pay his debt, nothing else is to be regarded in the *cessio*, but whether there be any concealment. If it be found, that the prisoner is really a bankrupt, and has no means, he is of course intitled to his liberty; because imprisonment in common cases is only a tentative remedy to force a debtor *squalore carceris* to make a full discovery of his effects. And by the way, this is the foundation of the act of sederunt, 18th July 1688, declaring, that this process shall not be sustained, unless the debtor has been a month in prison, which is judged a sufficient time to make him discover his effects, if he have any. The pursuer proceeded to the objections stated for the defenders; the first of which was, that the pursuer is imprisoned *per modum pænæ*, to which case the *cessio bonorum* reaches not; and that he can have no legal means of acquiring his liberty, other than paying the sum modified in name of assythment. To this it was answered, That the crime and the punishment were done away by the pardon; nor was it in the power of the Court of Justiciary, after admitting the pardon, to inflict any punishment whatever for that crime. It is true, the pursuer was remitted to prison till he should find caution to satisfy his party; and most justly, because, as the relict and children had his person secure for their claim, the Court could not withdraw that security from them: there was really no more done in this case than if the pursuer had been arrested in prison for a civil debt; in which case, the Court would not have liberated him upon payment of the assythment, but would have returned him to prison till he should also satisfy the other creditor; leaving him to obtain his liberty in the common course of law.

Some old statutes concerning remissions were strongly insisted on; the last of which only was taken under consideration, because the rest are all temporary. It is the 178 act, parl. 1593, enacting, "That no respite or remission be granted hereafter to any person at the horn for theft, reif, slaughter, or burning, until the party skaithed be first satisfied. And if otherways granted, to be null by way of exception or reply." And from this statute it was inferred, that the assything the party is a statutory condition of the pardon, which cannot be effectual without it; and therefore that the pursuer must still be understood to be in prison *per modum pænæ* till the sum modified for assythment be paid. This argument, by proving too much, proves nothing at all; for, at that rate, though the pursuer has obtained his Majesty's pardon, and though the same stands admitted in the Court of Justiciary, and all officers of law discharged to put the sentence in execution; yet all these proceedings are to have no effect: the pardon is null in law, and the pursuer lies open to have the criminal sentence inflicted upon him. Nay further, if this argument hold, it would not be sufficient that the pursuer had found caution in terms of the interlocutor of the Justiciary Court: for if the cautioner had become bankrupt before the modification, or after it before payment, the pardon would be null, because the act says, that the pardon shall have no effect till the party

party be first satisfied. And still further, the pardon would be null, suppose the pursuer had found caution as appointed by the Court, and was ready, with his money in his hand, to pay the sum modified : for the act expressly bears, that no remission be so much as granted till first the party's skaith be satisfied. These points, coming all of them under the words of this statute, are certainly not held at present to be the law of *Scotland*. And therefore the pursuer may with confidence plead, that this statute is in desuetude ; which he has the better reason to affirm, when it is considered, that none of the remissions that have been granted for many years past are in terms of the statute.

In the next place, supposing the statute in force, it will not aid the defenders. For it is specially required in the statute, that they appear in Court to plead the nullity : the objection must be moved by way of exception or reply ; and therefore, if the defenders have allowed the pardon to be admitted, without moving the exception, it is now too late to move it. There is no form known in the law of *Scotland* for overturning the proceedings of the Court upon such a pretext, much less for moving this objection in another court, as is done at present. And were this exception still entire, and competent to be proponed in the Court of Session, neither of which are true, what would be the consequence ? Why, that the Lords should find a pardon, admitted by the Court of Justiciary, to be void and null, and that the pursuer still lies open to have the sentence of death executed against him.

And now, if it cannot be maintained that the pursuer remains in prison *per modum pænæ*, there is an end of the question. For it was the opinion of the Court, that had the pursuer once obtained his liberty upon finding caution, and been again imprisoned upon a decree taken against him for the assythment, he would in that case be intitled to the benefit of a *cessio bonorum*. The claim of assythment, therefore, has no peculiar privilege that can get the better of common law ; and if the pursuer be not in prison *per modum pænæ*, the *cessio bonorum* must have its effect. And for illustration's sake, the following case was put. By the law of *Scotland* assythment is due upon casual homicide, and even upon homicide for self-defence : let us suppose a man tried for murder, while in prison, but at last acquitted upon self-defence ; yet the Judges would remand him to prison, till he should find caution to assythe the party. Surely it will not be pleaded, that in this supposed case, the claim of assythment would be a good defence against a *cessio bonorum* : yet this in effect is the same case with the present ; for by the pardon admitted in the Criminal Court, the pursuer is as effectually acquitted as he would be by the sentence of the Court, in case an exception of self-defence had been sustained to him and proved.

The pursuer in the last place insisted, that *esto* he were in prison *per modum pænæ*, he would notwithstanding be intitled to his liberty upon a *cessio bonorum*. Upon that supposition, his case would be the

same with that of a delinquent who is incarcerated till he pay a fine; and he endeavoured to prove that this man has the benefit of a *cessio bonorum*. A fine or amercement, from its nature, ought to be in proportion to the man's substance, so as not to touch his heritage, *Reg. Maj. lib. 2. cap. 74. § 7.* because otherwise it would in effect be a greater punishment than is intended; and at the same time a punishment upon the poor not upon the rich. When then a delinquent is imprisoned till he pay a fine, nothing is less intended than perpetual imprisonment: the fine being proportioned to his substance, it is understood to be in his own power to liberate himself from imprisonment. And therefore, if by misfortune he become bankrupt while he is in prison, so as not to be able to pay the fine, he ought even in that case to be admitted to a *cessio bonorum*; otherwise this absurdity must follow, That a sentence, by which only a temporary imprisonment was intended, shall, without the fault of the prisoner, be converted into perpetual imprisonment, the severest of all punishments.

This petition was refused without answers.

As the Judges seemed not to agree in their notions of this case, it is not easy to say what ought to be considered as the *ratio decidendi*. If the judgment is according to law, it must stand upon the following foundation, That by the original law of this land, the party injured is intitled to take revenge at his own hand, unless the delinquent give satisfaction by paying a sum commonly known by the name of *Vergelt*. Therefore if the sum be not paid, the right to be avenged of the criminal remains entire, which may be exercised by keeping the criminal under perpetual imprisonment; the party injured being barred by the pardon from avenging himself in any other manner.

This reasoning might have been well founded two centuries ago, but is scarce agreeable to the manners of a civilized nation. The King's pardon takes away the crime with regard to the public. By the very nature of the law of vergelt, the party injured ought to accept a moderate satisfaction in money, conformable to the circumstances of the criminal; and therefore, upon the same principle, ought to give up his resentment altogether, if the criminal be a beggar and have nothing to pay. And the brutality of detaining a poor wretch under perpetual imprisonment, for no better reason than that he is a beggar, ought not to be indulged.

N. B. The present case can seldom occur, if Judges act according to law, which is to modify the allythment in proportion to the circumstances of the criminal. But over-sight in the Barons of Exchequer modifying L. 100 without regard to *Malloch's* circumstances, brought on this intricate question.

N^o CXXVII.

3d December 1751.

CREDITORS OF CASTLE-SOMERVILL *contra* Mr JOHN LOOKUP.

A D J U D I C A T I O N.

IN a ranking of the creditors of *Castle-Somervill*, an objection was stated against the interest produced for Mr *John Lookup*, that he had knowingly adjudged for more than was due; and though here was a plain *mala fide pluris petitio*, yet out of regard to equity, the Court sustained the adjudication as a security for the principal and interest, without expences or accumulations. After which, there can scarce be any prospect of cutting down an adjudication *in totum* for a *pluris petitio*.

N^o CXXVIII.

12th June 1752.

ANNE and MARGARET LANDALES *contra* THOMAS LANDALE.

V I R T U A L P R E C E P T of CLARE CONSTAT.

ANDREW LANDALE received from *John Gibson* of *Durie*, August 1667, a charter of the land of *Burns* alias *Little Balcurvie*, in favour of himself, and the heirs procreated or to be procreated betwixt him and *Anne Brown* his spouse, whom failing, to his other heirs and assignees; and upon this charter he was infeft October 4. 1667. The same *Andrew Landale*, September 3. 1686, executed a disposition of this subject in favour of *David Landale* his eldest son, containing procuratory and precept; and *David*, after his father *Andrew's* death, continued to possess the land by virtue of this personal right till the year 1719, that *Alexander Gibson* of *Durie* needing, for the benefit of his coal-works, a rivulet that run through the said land, a transaction was made, binding *David Landale* to pay to *Durie* a certain sum of money, and to allow him the use of his rivulet; and, on the other hand, binding *Durie* to change the holding of the land from ward to feu. In pursuance of this transaction, *Durie*, upon May 28. 1719, granted a charter of the said land, bearing, "that it was formerly held by *Andrew Landale* and his predecessors, of the granter and his predecessors, by the service of ward and relief; but that it being agreed for a certain sum of money instantly paid, and for a feu-duty after mentioned betwixt the granter and *David Landale* eldest lawful son of the said *Andrew Landale*; and also as having right to the foresaid land from his said father by a disposition of date September 3. 1686, that the holding should be changed from ward to feu; therefore he grants of new the said land to the said *David Landale* in liferent, and

" to

“ to *Andrew Landale* his eldest son, his heirs and assignees, in fee, reserving to *David* the father power to alter, &c.” Of the same date, *David* grants to *Durie* an obligation for the use of the water, and upon May 30. sasine followed upon this charter in favour of the father *David* in liferent, and of the son *Andrew* in fee; the sasine bearing, that *David* the father appeared personally, holding in his hand the precept of sasine contained in the said charter.

Andrew Landale the son anno 1726, disposed the subject to *Anne* and *Margaret* his two sisters, reserving his liferent and a power to alter. First *Andrew* died, and then *David* his father, leaving *Thomas* his only child of a second marriage, who slipped into possession after his father's death. *Anne* and *Margaret Landales* brought a process of removing against him. *Thomas* hoping that the charter and sasine 1719 would be found null and void, as contrary to the forms established in our practice for the entry of heirs, served himself heir to his grandfather *Andrew* as the person last regularly infeft, and upon that title claimed the property. On the other hand, it was contended by the pursuers, that a charter granted by the superior to *David* himself *qua* heir to *Andrew* his father, was an effectual title, as equivalent to a precept of *clare constat*, and that this charter to him in liferent, and to his son *Andrew* in fee, must be equally effectual; especially as *David* the heir was in effect *fiar* by that charter, the fee given to his son *Andrew* being intended for no other purpose but to save him the expence of making up titles after his father's death. The case being heard in presence, the Court “ found, that the charter dated May 28. 1719, granted by *Durie* in favour of *David Landale* in liferent, and *Andrew Landale* his son in fee, did not establish a proper feudal-right in the person of the said *Andrew Landale*.”

In reclaiming against this interlocutor, the pursuers insisted chiefly upon one topic, that the whole forms in making up titles to an estate in the person of an heir, go upon the supposition that the property is in the superior, and that a precept of *clare constat* is in effect a new grant of the property from the superior to the heir; from whence they drew this conclusion, that if the deed granted by the superior to his vassal's heir, be in its nature *habile* to convey property, it is of no consequence whether it be in the form of a charter, or of a precept of *clare constat*.

In handling this point, the pursuers took for granted as *omnibus notum*, that originally, in the constitution of a feudal holding, no branch of the property was transferred to the vassal: the land was not disposed to him in property; he was only entered into possession to enjoy the fruits as his wages and maintenance. And indeed, all the feudal casualties and delinquencies are founded upon this proposition: if a vassal committed a delinquency by which he rendered himself incapable to serve his superior, the possession returned to the superior with the fruits, and was called liferent escheat: if the vassal's heir, because of his non-age, was incapable to do

do military service, the possession continued with the superior till the heir was major; and the same was the case during the year and day which the heir had to deliberate whether he would chuse to enter into the superior's service; and so soon as the heir was willing to undertake the service, the land was delivered to him for his wages, in the same manner as it was delivered to his predecessor.

It is true, when the rigour of the feudal law began to abate, and land came gradually to be *in commercio*, a notion crept in of a property in the vassal; and upon that notion was grafted the military vassal's power of alienating the half of the land. This power of alienation introduced an obligation upon the heir to pay the debts of the former vassal, which in *England* is, to this day, commensurate with the vassal's power of alienation, that is, to pay the debts to the extent of the half of the feu: in this country, the maxims of the *Roman* law having prevailed, we have adopted the identity of person, and their notion of a *hereditas jacens*; and, in following that track, have made the heir universally liable for the predecessor's debts.

But though in the course of time, the feudal establishment is greatly changed, yet it is material to be observed, that the form of investing the heir continues precisely the same as it was originally, without any variation. That form was introduced when the property was understood to be entirely in the superior, and is regulated on that supposition. And as the form continues the same to this day, any doubt that can arise about the making up titles in the person of an heir, must be determined by the principle upon which the form is established; that is, upon the supposition of the superior's being proprietor, and of the possession derived from him to the vassal's heir. Hence it follows, that the charter under consideration must be effectual at this day, if it would have been effectual 400 years ago.

And in passing, it will not be lost labour to consider how lawyers are puzzled when they apply the genuine principles of property to this case of a feudal holding. It is a principle in the laws of all nations, derived from the nature of the thing, that two persons cannot at the same time be proprietors of the same subject, or that the same thing cannot at once belong to two different persons. A common property is no exception, nor a property which is in two *pro æquis partibus*. But in a feudal holding, each is supposed to be proprietor without any common property, or property *pro æquis partibus*: the property is as it were split into parts, and these parts as it were divided betwixt the superior and vassal; a conception that does not square with the idea of property. But what is still more difficult to digest, the superior who has what is called the *dominium directum* with regard to his vassal, has only the *dominium utile* with regard to the Over-lord his superior. It is no wonder then, that Lord *Stair*, handling this subject, has been greatly gruelled. "Some (says he) have
" thought superiority but a servitude upon the vassal's property; and
Z z z " others,

“ others, that the fee itself is but a servitude, *viz.* the perpetual use
 “ and fruit ; yet the reconciliation and satisfaction of both hath
 “ been well found out in naming the superior’s right *dominium direc-*
 “ *tum*, and the vassal’s *dominium utile*, whereby neither’s interest is
 “ called a servitude.” But this leaves the matter as dark as before,
 since his Lordship has not attempted to give a definition of these ex-
 pressions, nor to point out their precise ideas.

But the true explanation is this : In some respects, the vassal is under-
 stood to be proprietor, in others he is not : with regard to the
 power of contracting debt, he is considered as proprietor, as well
 as with regard to these debts being made effectual against his heir ;
 but with regard to the feudal casualties, at least some of them, he
 is only considered as *usufructuarius* : life-rent-charge does not involve
 in it any transference of property from the vassal to the superior ;
 the superior is considered as proprietor, the vassal as *usufructuarius* on-
 ly, and when the vassal is deprived of his possession by his crime, the
 superior is intitled to assume the possession by his right of property.
 The same notion is applicable to ward ; and hence in the law of *Eng-*
land, the terms of which are more precise than of ours, vassal and te-
 nant have the same meaning. And lastly, what is more direct to
 the present purpose, the form of investing the heir goes upon the
 same supposition, *viz.* that the superior is proprietor. It is the su-
 perior who delivers the possession to the heir, by granting a precept
 for infefting him ; and any right the vassal obtains by this infeft-
 ment is understood to be derived from the superior, and not from
 the ancestor, whose right in this case is understood to die with him.
 One thing at least is clear as to the form of making up titles, that
 any property supposed to be in the vassal, is only a property for life :
 after his death, the entire property rests with the superior ; and it is
 the superior who renews the feu in the person of the heir by a new
 grant of the property, according to the obligation he is under by the
 feudal contract of renewing this feu for ever, to the heirs of the ori-
 ginal vassal.

Nor need it create any difficulty, that, according to this reason-
 ing, the superior after the vassal’s death would be at liberty to alie-
 nate the subject in favour of a third party, seeing he is under no re-
 straint but by a personal obligation ; for the pursuers have already
 suggested several instances, where the notions of a feudal-holding do
 not well quadrate with the common principles of law. Our customs
 and regulations were introduced in days of ignorance, when the
 principles of law were very little understood : and therefore it is suf-
 ficient to say, that, in constituting a feudal-right, the superior was
 understood to be restrained from alienating in prejudice of his vassal
 and his heirs, as well as the vassal was restrained from alienating in
 prejudice of the superior and his heirs.

What darkens the point with regard to the entry of heirs is,
 that by notions derived from the *Roman* law, we, in the present age,
 conceive

conceive a service, and a precept of *clare constat* to be a sort of *aditio hæreditatis*, by which the heir connects with the deceased predecessor, and is subjected to pay his debts. But no such thing is implied in these forms: all is transacted betwixt the superior and the heir: the heir demands possession from the superior; and the superior fulfils his obligation by granting a precept of *clare constat* for introducing the heir into possession. The service of an heir is substantially the same, with no other difference but what arises from circumstances peculiar to the Sovereign: a private superior is supposed to know all his vassals and their heirs: the multitude of the King's vassals, and the cares of government, make it necessary that the King should take the assistance of others: when a man accordingly, as heir of a deceased vassal, applies to the King, the King does not say, *quod mihi clare constat*; but in order to be informed, directs a brieve to be issued from Chancery, ordering the sheriff to inquire into the necessary facts; a report is made to the King, and if the report be favourable, he issues his precept to the Sheriff to put the claimant in possession. In all these steps not a word of representing the predecessor, nor of deriving any right from him. The identity of person, the *hæreditas jacens*, and the *aditio hæreditatis*, are fictions derived from the Roman law, to which our forms were made to bend, after land came to be in commerce, and after the heir, upon just and equitable considerations, was subjected to pay his ancestor's debts.

There are other considerations tending to make out, that in the form of vesting the heir, the superior is understood to have the full property in him. The first is, that in all civilized countries, a remarkable difference is admitted betwixt transferring property *inter vivos*, and transferring it by succession: delivery is always necessary in the former case, never in the latter; confirmation vests moveable subjects without delivery and without possession; and a general service vests the heirship moveables without either. In *England* and *France*, lands vest in the heir *sola existentia*; which shows, that in *England* and *France*, lands are understood to be derived from the deceased vassal to his heir, and in that respect to be similar to moveables. But in *Scotland*, we adhere strictly to the ancient feudal notions of the subject being transferred to the heir, not from the ancestor, but from the superior, which as being an act *inter vivos*, requires delivery: delivery accordingly is made by the superior to the heir, and it is the superior's bailie, who, by his order, gives investment. This proves irrefragably, that, in granting the precept of *clare*, the superior is understood to act as proprietor; because in the laws of all civilized countries, delivery can avail nothing to transfer property, unless it be made by the proprietor, or by his order: and were the property understood to be derived from the deceased vassal, delivery of land would be no more necessary in *Scotland*, than it is in moveables, and no more necessary than it is in *France* or *England*.

Another

Another consideration was drawn from the form of renouncing to be heir, upon which great weight was laid. If an heir, instead of claiming an investiture from the superior, renounces to be heir, the superior from that moment is at liberty to dispose of the subject as he thinks proper. If the property be supposed to be *in hæreditate jacente* of the deceased vassal, a renunciation cannot transfer it to the superior; because the genuine effect of a renunciation is to disburden property of any subaltern right affecting it, but never to convey property from one hand to another. This proves, that in questions betwixt the superior and the vassal's heir, the full right is understood to be in the superior, subjected only to an obligation of investing the heir if he insist upon it; and that the lands are not understood to be *in hæreditate jacente* of the deceased. This observation was illustrated by the old form of adjudications *cognitionis causa*, for which we have Hope's authority, in his *Minor Practics*, sect. 278; if an heir-apparent renounced, when he was charged by a creditor, the effect was understood to be the same as when he renounced upon the superior's charge; the superior had the free disposal of the subject, without regarding the debts of his deceased vassal: but the Court interposed in favour of the creditors upon principles of equity, and ventured without a statute, to sustain an action against the superior, at the instance of a creditor demanding payment. This was the old form of the adjudication *cognitionis causa*: and though in our later practice this form has been altered to an adjudication against the heir, upon the supposition of a *hæreditas jacens*, yet this alteration can have no influence upon the present argument, seeing the form of investing the heir remains the same that it ever was.

If now, in all questions concerning the form of making up titles to land by an heir, the superior is considered as full proprietor, subjected only to an obligation of a renovation of the feu in favour of the heir; the obvious consequence is, that with the heir's consent, who is creditor in this obligation, a charter granted by the superior to a third party must be effectual in law; supposing only that there are no creditors to interpose, who may be hurt by such a conveyance. And indeed it is not seen how this consequence can be evaded; for certainly it will not be maintained, that the heir's renunciation can have a stronger effect than his direct consent. Nor can his direct consent, supposing it interposed by a formal deed under his hand, have a stronger effect than his consent proved *rebus et factis*.

At advising the cause, stress was laid upon this point, that a charter, though granted in favour of a person who has a procuratory of resignation, can have no effect unless the land has been actually resigned. But the pursuers insisted, that considerations of this nature are quite out of their case. They admitted, that in many respects the vassal is understood to be proprietor: he is understood so in all acts *inter vivos*; and for that reason, when a vassal grants a procuratory of resignation, the superior cannot grant a charter even to the disponent, till the land be actually resigned into his hands. And it is the

the act of resignation, which, by the temporary consolidation of the property with the superiority, enables him to grant a charter of resignation. It has been urged more than once, that with regard to the vesting of heirs, matters stand upon a different footing: the vassal's property dies with him: the whole rests with the superior just as much as if the land had been resigned in his hands: though in this case, without any supposition of a transference of property, he stands bound to make a new grant in favour of the heir of the vassal; and he may make this grant in favour of a third party, if the heir consent. But the pursuers were not satisfied to show that this argument from a resignation does not conclude against them: they endeavoured to show that it concludes for them. It is agreed that there can be no conveyance from a vassal infeft, unless by the intervention of a resignation either *in favorem* or *ad remanentiam*: but a simple renunciation by an heir-apparent is sufficient to empower the superior to dispose of the subject at his pleasure. Here is a remarkable difference betwixt the case of a vassal infeft, and of an heir-apparent; which is a demonstration of the doctrine above laid down, that a vassal infeft is proprietor, but that his property dies with him; and that to give the superior an unlimited power over the land, no more is necessary but to discharge or renounce the obligation he is under to renew the feu in the person of the heir. And indeed how else can it be accounted for, that a renunciation by an heir-apparent should have so ample an effect, and that a renunciation by a vassal infeft should have no effect at all? The pursuers are here only talking of the superior's power over the subject with regard to his vassal and his vassal's heir; for they admit, that a renunciation has no such effect where third parties are concerned: if an heir renounce at the suit of a creditor, the creditor formerly had no remedy but a process against the superior to infeft him in the land; but in our later practice, the same effect is not given to a renunciation: the vassal with respect to his creditors is understood to be proprietor, his property is understood to subsist after his death, and the land to be *in hæreditate jacente* of him, and consequently to be a subject affectable by his creditors. The heir's renunciation, in this view, cannot have the effect to convey this *hæreditas jacens* to the superior; and therefore the Court in a proper process adjudges the *hæreditas jacens* to belong to the creditor. Here then is not only a remarkable difference in the effects betwixt a resignation and a renunciation, but a like remarkable difference betwixt renunciation in different circumstances, all tending to support the doctrine above laid down. When an heir renounces at the instance of a creditor, the lands are supposed to be *in hæreditate jacente* of the deceased debtor, which the creditor may affect by an adjudication: but where the heir renounces at the instance of the superior, supposing no debts, there is no such thing understood as a *hæreditas jacens*: the property is understood to be in the superior, and is so to all

intents and purposes, as soon as the heir has renounced his claim for an investiture.

Hitherto to prevent embarrassment, the case has been considered as if there were no change of holding, being the simplest case. And with respect to the change of holding, the pursuers are lucky to have *Craig's* authority, *lib. 2. diag. 12. sect. 9.* that in the *renovatio feudi* the holding may be altered, if so agreed betwixt the superior and the heir of the vassal; of which there can be no doubt, if it be admitted that in the *renovatio feudi* the superior is understood to be proprietor: now if the holding can be changed in a precept of *clare constat*, which never was controverted, or in a charter to the heir himself, why not in a charter granted with the heir's consent to a third party? or rather, why not in a charter to the heir himself, tho' his son be taken into the investment to save the expence of making up titles.

With regard to the case of *Dundonald* cited for the defender, the circumstances differ widely from those in the present case. The Earl of *Dundonald* had disposed certain lands to his eldest son, in the eldest son's contract of marriage, with procuratory and precept, and investment passed upon the precept. Many years afterward the Earl disposed the same lands to his grandson, with procuratory and precept, without taking notice that he had disposed these lands *ab ante* to his son, or that the grandson was heir. The Court justly found, that the grandson by this disposition took the lands as purchaser, not as heir; that by the disposition he was not liable for his predecessor's debts; and therefore that the lands remained *in hereditate jacente* of the son, to be taken up by the heirs at law. In the present case, the charter is granted to the heir in that character; and this makes a passive title. Accordingly, it appeared to be the opinion of the Court, that a charter to *David* himself, *qua* heir, would have been effectual; and that the error lay in giving the charter to his son, and in changing the holding. The case of *Culterallers* is still more remote, which was a plain purchase of a superiority by an heir apparent. Such a purchase made by an heir apparent *tanquam quilibet*, cannot be understood to carry more than what the superior has in his own right: the heir by such a purchase claims nothing in his quality of heir, and therefore can neither carry what was in his predecessor, nor be subjected to his predecessor's debts; for as a feudal heir by our law, is not proprietor *sola existentia*, the feu that was in his ancestor cannot be vested in him till he claim a renovation of the feu. And indeed had *Alexander* the 5th of *Culterallers* been resolved to abandon his predecessor's inheritance because of debts or upon any other account, he could not act with more caution than he did when he purchased the land from the superior *tanquam quilibet*, avoiding to put in his claim to the feu as heir to the vassal invest. This reasoning is also applicable to the case of *Dundonald*: the grandson had it in his option to claim the estate as heir to his father, but chose not to claim it in that capacity, or to demand a renovation of the feu from the grandfather *qua* superior: He chose

tanquam

tanquam quilibet to take a disposition from his grandfather ; which, from the nature of the thing and construction of law, could carry nothing but what the grandfather had power to dispose of in his own right, and not what he had *ab ante* disposed to his son.

Here indeed the charter was given to *David* as heir of line, whereas the former investiture stood in favour of the heirs of the marriage betwixt *Andrew Landale* and *Anne Brown* his spouse. But *David Landale*, who took the charter 1719 from *Durie*, was heir of that marriage as well as heir of line ; and it is an established rule, that where a man can claim an estate upon different titles, each of them total, it is sufficient that he connect with the estate by any one of these titles. This was established in the case of *Theodore Edgar* ; and justly, because if a man have the property by one title, he cannot have more by many titles. The case is very different in a general service, which making no mention of any particular subject, carries nothing but what is destined to the raiser of the brieve in the character he assumes. And were a general service to be interpreted an active title beyond what belongs to the heir in that precise character, it might have woeful effects by subjecting him to debts he never meant to be subjected to.

These were the arguments by which the pursuers endeavoured to make out, that by the charter and sasine 1719, a proper feudal right was established *formally* in *Andrew* the son, and *substantially* in *David* the father. But the Court did not listen to these arguments ; considering only, that it was deviating from the common road to establish a feudal right in the foregoing manner, and that it was safest to adhere to the established forms ; therefore they adhered to their former interlocutor. The feudal law is wearing out, and we have in a great measure lost sight of its principles.

Nº. CXXIX.

12th June, 1752.

ANNE and MARGARET LANDALES *contra* THOMAS LANDALE.

V I R T U A L A S S I G N A T I O N .

ANDREW LANDALE, proprietor of the land of *Burns* alias *Little Balcurvie*, executed a disposition of the same, September 1686, in favour of *David Landale* his eldest son, containing procuratory and precept ; and *David*, after his father's death, continued to possess the land by virtue of this personal right till the year 1719, that he entered into a transaction with *Gibson* of *Durie* his superior ; one article of which was, that, for a sum certain, *Durie* should change the holding from ward to feu. This agreement was executed May 1719, in a charter granted by *Durie*, bearing, “ That
“ the lands were formerly held by *Andrew Landale* and his prede-
“ cessors of the granter and his predecessors by the service of ward
“ and relief ; but that it being agreed for a certain sum of money
instantly

“ instantly paid, and for a feu-duty after mentioned, betwixt the
 “ granter and *David Landale*, eldest lawful son to the said *Andrew*
 “ *Landale*; and also as having right to the foresaid lands from his
 “ said father, by disposition, of date 3d *September* 1686, that the
 “ holding of the lands should be changed from ward to feu; there-
 “ fore he grants of new the said lands to the said *David Landale* in
 “ liferent, and to *Andrew Landale* his eldest son, his heirs and af-
 “ signees, in fee; reserving to *David* power to alter, &c.” Sasine
 followed upon this charter to *David* in liferent, and to *Andrew* in
 fee; the sasine bearing, that *David* appeared personally, holding in
 his hand the precept of sasine contained in the charter.

Andrew died without issue, after disposing the estate to his two
 sisters *Anne* and *Margaret*. *Thomas*, their brother of a second mar-
 riage, being advised that the said charter and sasine were not suf-
 ficient to establish a feudal right in *Andrew*, made up titles to his
 grandfather as the last person regularly infeft, which brought on a
 competition betwixt him and his sisters. It was pleaded for them,
 That supposing *Durie* to have no title to grant this charter as being
 a deed flowing *a non habente potestatem*; yet since it was granted with
 consent of *David Landale*, it must be effectual *quoad* all right that was
 in *David*; viz. the disposition with procuratory and precept. It
 was admitted on the other hand, that a consent in writing must
 have the effect to convey every right to the subject in the consent-
 er's person; but that a consent *rebus et factis*, tho' it may have the
 effect of a *non repugnantia* to bar the consenter *personali objectione*, can-
 not operate a conveyance, especially of a right to land.

In answer to this, two points were insisted on for the sisters;
 1^{mo}, That a *non repugnantia* was sufficient in this case to establish a
 right in *Andrew* their author. And 2^{do}, That here was really a
 consent in writing, sufficient to operate a conveyance of the per-
 sonal right that was in *Andrew*, if such conveyance should be thought
 necessary.

And with regard to the first it was premised, that the proprie-
 tor's consent to a disposition of land granted by one who is not pro-
 prietor, does not suppose any transference of the property from
 the consenter to the disponent: the consent operates the effect in-
 tended by it, without so violent a supposition for the disponent's
 title; and the proprietor's consent neither has nor needs to have
 any effect beyond a simple *non repugnantia*; because a disposition of
 land, whoever be the disponent, is good against all the world ex-
 cept the proprietor; and if his consent be obtained, there is an
 end to all challenge. This is the doctrine taught by Lord *Stair*,
 B. 2. tit. 11. §. 7. of his *Institutes*, where the matter is put upon
 this footing, That tho' the consent is not sufficient of itself, yet see-
 ing there is a formal conveyance, tho' granted by one who has no
 right, here is both the substance and solemnity of the act. This in
 effect is saying, that the disposition is the solemn deed which con-
 veys; and that any defect of right in the disponent, is supplied by
 the

the consent of the proprietor. His Lordship accordingly adds, "That the disposition has the same effect as if it had been really granted by the consenter, who is proprietor." Upon this footing a consent *rebus et factis*, which, as admitted, bars the consenter *personali objectione*, must have the effect to validate the charter in favour of *Andrew* the son, even supposing it granted *a non habente potestatem*. The only person intitled to quarrel this charter was *David* the father; and as it was granted with his consent, and indeed by his direction, it is good in law, and no mortal is intitled to object.

The maxim of *jus superveniens auctori accrescit successori*, stands upon the same foundation of a *non repugnantia*, and does not suppose an actual conveyance. A man disposes land who has no right to the same, and afterward, perhaps at the interval of years, acquires the property, the purchaser's right is thereby confirmed against all challenge. But this does not infer, that the late right to the property acquired by the author, is actually conveyed to the purchaser. It is not impossible, but that the author in purchasing the property intended it for his own behoof, without thinking to convey it to the disponent; and therefore, we cannot say that it is conveyed. But the disponent's right is compleated without any such supposition: he has, according to Lord *Stair*, the solemnity of a conveyance, and any defect in the substance, for want of power in the author, is removed by his late acquisition of the property: for, after that acquisition, no other mortal is intitled to challenge the disponent's right, and the author is barred from challenging *personali objectione*.

It is a different question, whether the charter granted by *Durie* to *Andrew* with consent of *David*, who had only a personal right, can have the effect to establish a proper feudal right in *Andrew*. It may possibly be thought, that the right granted *a non domino*, however formal, cannot have a stronger effect, than if it had been granted by *David* the consenter, which upon that supposition, could only convey the personal right that was in *David*. But if *Durie's* charter shall have this effect, it comes out to be a personal right to the estate, granted with the consent of *David*, which is as good a foundation for preferring the sisters, as if *David* had made a formal conveyance of his personal right to his son *Andrew*.

Upon the second point it was maintained, that supposing a consent in writing to be necessary, here is *de facto* a written consent. For tho' *David Landale* does not subscribe the charter, yet he is a party to the transaction: the charter bears *David's* consent to change the holding from ward to feu, and it necessarily infers *David's* consent to take his son *Andrew* into the right. Here then is *David's* consent, not left to be evidenced *rebus et factis*, but expressed in a formal writing. Take the case of a tack subscribed by the landlord only, delivered to the tacksmen, and he put in possession; does any one doubt that the tacksmen's consent to pay the rent is

in writing; and when the landlord pursues for his rent upon such a tack, does he make any difficulty of libelling upon an agreement with his tenant proved by the tack? In the same manner the charter under consideration was an evidence against *David* of his agreeing to pay five merks yearly of feu-duty, which he accordingly paid during his life. If *Thomas* then has any thing to say, he must reform his pleading, and maintain, that to give consent its due effect in a case like the present, it is not sufficient that the consent be in writing, but that the writing must be subscribed by the consenter himself. If this be law, it is a discovery: but till this be made out, the sifers will take it for granted, that if a written consent be at all necessary, it is contained in *Durie's* charter, tho' not subscribed by the consenter; considering that this charter is of such a nature as not to require the subscription of the consenter.

“ Found, that the charter granted by *Durie* to *David Laulake* in
 “ liferent, and *Andrew* the son in fee, did not convey to *Andrew*
 “ the personal right that was in *David*.

Elchies gave his opinion, that a consent when necessary to validate a title to land, whether it operate as a virtual conveyance, or only as a *non repugnantia*, must be in a writing subscribed by the consenter himself. The other judges seemed to be of the same opinion; and this therefore must be considered as the *ratio decidendi*.

N^o. CXXX.

MARGARET FAIRLIE *contra* Earl of ROTHES.

C A U T I O N E R.

MMARGARET FAIRLIE, in the right of her deceased husband *William Hay*, who had become bound in great sums as cautioner for the Earl of *Roths*, insisted in a process against the Earl for relief, and obtained an interlocutor from the Lord Ordinary, “ decerning the defender to free and relieve her of the
 “ whole debts contained in a list amounting to L. 4029 Sterling of
 “ principal; and for that end, to make payment to the respective
 “ creditors, so as the pursuer may obtain her husband's bonds and
 “ bills retired, or a sufficient discharge thereof.” The pursuer thereafter insisted, that the defender should be decerned to pay to her the sums contained in the foresaid list, that she might apply the same for her relief. It was answered for the defender, That an obligation of relief is a *factum prestandum*; to perform which, there can be no other compulsion but a charge of horning, denunciation and caption; that it is not in the power of this Court to substitute any compulsion in place of what is provided by common law; and that the demand of paying the sum to the pursuer, in order that she may relieve herself, is not founded on the obligation of relief granted

granted by the defender to the pursuer. It was replied, That the compulsion provided by common law, tho' sufficient in common cases; cannot be effectual in the present, or rather there can be no such compulsion in the present case; peers being privileged against captions by the articles of union; and escheats upon denunciations for civil causes being taken away by the late statute. This point being new and singular was taken to report, and the topics urged for the pursuer were what follow.

In point of fact the premised, *1mo*, The casualties of single and liferent escheat, incurred by horning and denunciation for civil causes, are taken away and discharged for ever, by act 20th Geo. II. intituled, "Act for taking away the tenor of ward-holding in Scotland, &c." And that not only when the horning proceeds upon a liquid ground of debt, but also when it is for performance of obligations; for so the act declares. The denunciation then upon a charge of horning for a civil cause, is rendered by this statute a *brutum fulmen*, no better than a simple charge of horning, or than a decree without a charge. *2do*, Peers being by the articles of union privileged against personal attachment, the compulsion by caption cannot take place against them. And *lastly*, The defender's estate being strictly entailed, and the debts in question not being effectual against the entail, the defender's death will reduce the pursuer and her children to beggary, if she obtain not relief from the defender himself.

Thus stands the pursuer's case; and even abstracting from her peculiar circumstances, the case in general well merits the attention of the Court. The strongest compulsion for performance of *facta præstanda*, viz. the penal consequences of a denunciation, are taken away with regard to all the lieges; and Peers, who are a numerous body, are not subjected to caption. The compulsion of the common law being thus removed, it is the province of the Court of Session, as a court of equity, to provide another remedy; and can one more proper be invented than to decern the debtor to pay to his cautioner, in order that the cautioner may relieve himself by making payment to the creditor. This very thing ought to be the consequence of the interlocutor obtained by the pursuer. By that interlocutor the defender stands bound to relieve her: the next step is, to assign him a day for performance; and if he fail, the last step is to decern him to pay to the pursuer herself: these different steps naturally follow one after another, in order to fulfil the bond of relief.

This power of the Court, as a court of equity, gave existence to adjudications *cognitionis causa*, to adjudications in security, and to many other diligences which have no foundation in common law: and no case calls louder for a remedy than the present. Let an adjudication in implement be attended to in particular. This process was invented by the Court of Session, to make effectual minutes of sale and dispositions of land not containing procuratory nor precept. Yet a remedy in these cases was much less necessary than in the

the present : for when an adjudication in implement was introduced, the compulsions of denunciation and caption were in full vigour.

The remedy introduced by the act of federunt 1582, to enforce performance of decrees for liquid sums is not less remarkable. Before that period no execution was competent upon liquid debts, other than poinding, apprising, and arrestment : but the Court observing, that defenders did often secrete their effects, in order to disappoint their creditors obtaining decrees against them for liquid sums, did enact, that letters of horning as well as of poinding, should be directed upon such decrees. The Court will also have it in their eye, that when our Peers were exempted from personal execution by the union, whereby a second diligence against them as witnesses was rendered ineffectual, a remedy upon that occasion was invented, which is to appoint them to appear under a penalty ; and this remedy, tho' extremely rational, was an act of power as great, if not greater, than that now contended for.

It shall only be added to enforce the present demand, that the pursuer is in a more favourable case than ever again can exist. After the ward-act, it is the cautioner's own fault if he provide not to himself a clause in his bond of relief, obliging the debtor to pay the money to him, in order to relieve himself ; which is a most rational precaution, where the remedy provided at common law is taken away. But in the present case, *William Hay* became cautioner at a time when the law provided him a compulsion to force the principal debtor to pay the debt, for he died before the ward-act had a being ; and if the remedy competent to him and his representatives be taken away by statute, it is but common justice that another be put in its place.

It was suggested in behalf of the defender, that the pursuer had a remedy in her power, which was to apply her own funds for payment of the debts, and to take assignments upon which she can proceed to execution. But in the *first* place, this is no remedy at all to enforce performance of a *factum præstandum* : it is not a remedy that obliges the principal debtor to pay, in order to relieve the cautioner : it is the quite contrary ; it is saying to the cautioner, he is to have no relief as cautioner, but must pay the debt in order to claim as creditor. And in the *next* place, it is frequently difficult, and in the present case impracticable, to use this remedy ; for the pursuer has neither credit nor funds sufficient.

The pursuer concluded with the following observation, that in borrowing money the cautioner has indeed an opportunity to demand a bond, obliging the principal debtor to make payment to him for his relief : but in many cases there is no such opportunity ; as for example, where a decree is taken against an heir for a moveable debt. This question therefore is of general importance.

This question was delayed thro' hopes of an accommodation ; and perhaps the pursuer will not have occasion to demand the judgment of the Court.

F I N I S.



I N D E X.

N. B. *Figures with N° before them, refer to the number of the decision; figures without that addition refer to the page.*

A.

- ACTION]** no man intitled to sue but for his own inrerest. 183.
 Act of parliament 1695 concerning an heir-apparent three years in possession, analyzed. N° 23.
 Act 1695 introducing the septennial prescription, analyzed. N° 35.
 Act 1661 preferring the defunct's creditors to those of his heir, analyzed. N° 86.
 Act 1672 concerning the form of citing defenders, analyzed. N° 87.
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 Act 1681 concerning the formality of writs explained. 209.
 Act 1617 concerning prescription, analyzed. 225. 227.
 Act 1700 concerning popery, analyzed. 230.
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 Act 1696 concerning bankrupts, analyzed. 242. 243. 247.
 Act of sederunt ranking *pari passu* all the creditors who do diligence for affecting their debtor's moveables, within six months of his death, analyzed. N° 27.
Additio hereditatis] defined. 128. 275.
 Adjudication] homing against the superior does not pass upon an adjudication pronounced in the sheriff-court, N° 34. The office of principal usher to the parliament may be carried by adjudication, N° 82. A tack including assignees is not adjudgeable, N° 84. The privilege of superintending the elections of a royal burrow may be conveyed by adjudication. N° 104. What is the effect of a *pluris petitio*. N° 127.
Æmulatio vicini. 80.
 Alien] cannot succeed to lands in *Scotland*. N° 106.
 Aliment] a liferentrix of land is obliged to aliment the heir, but not the liferentrix of a sum of money. N° 3. The relict is bound to club with the heir for maintainance of the younger children. N° 99.
 Annualrent] denunciation at the market-cross of *Edinburgh* of a debtor who lives in a different sheriffdom, does not make the sum bear interest. N° 43. Annualrent not due by an executor, even for sums uplifted by him bearing interest. N° 79. Infeftment of annualrent preferred in a competition before arreftments. N° 94.
 Appel] what is the proper execution for making effectual a decree of the House of Lords. N° 44.
 Arrestment] a partner's stock in a trading-company is attachable by arrestment. N° 33.
 Assignation] when the debtor concurs in the assignment, intimation is unnecessary. N° 124.
 Assythment] a prisoner liable for a sum in name of assythment has not the privilege of a *cessio bonorum*. N° 126.

B.

Bank-notes] cannot be vindicated from the *bona fide* possessor, however clear the proof of the theft may be. N° 125.

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Bankrupt] an irrational provision of *L. 2000* to an only daughter, who was secured in the succession of an opulent fortune, was required upon the act 1621. N° 72. It is wrong at common law for a man in labouring circumstances to do any deed, purposely to prefer one of his creditors before another. N° 95. At what time is the qualification of netour bankruptcy understood to have commenced. N° 113. The clause in the act 1696 declaring dispositions, heretofore bond, &c. to be of the date of the seisin, does not concern *nova debita*. N° 120. Nor bankrupts who are not intent. *Ibid.*

Beneficium inventarii] the nature of this benefit. 14.

Bill of Exchange] must be protested for non-acceptance on or before the day of payment. N° 42. Tho' null as bearing annual rent and penalty, the verity of the debt may be ascertained by collateral evidence. N° 46. Whether a bill of exchange betwixt two persons is intitled to any extraordinary privilege. N° 93. What courts competent for registration. 216.

Blank writ] what effect is given to a bond originally blank, as to the name of the substitute. N° 36.

Bond] with a clause of registration, its effect. 208. Its history. 211. 213. Bond of corroboration is null *quoad* the cautioner, where the sum corroborated happens by oversight to be omitted in the binding clause. N° 108.

Burgh] a burgh of barony is not a good title for acquiring a servitude of pasturage by prescription. N° 4. The nature of a burgh of barony. 6. 7. The head burgh is the place where all courts must be held, unless the contrary be specified. N° 21. The constitution of a burgh-royal borrowed from the *Romans*. 182. The nature of its common good. 182. Who have right to elect the magistrates. 193. None but those who are resident can be elected bailies; but it is not necessary, that the provost or any of the counsellors be resident burghesses. N° 103.

C.

Caption] form of executing letters of caption against magistrates to receive the debtor. N° 39.

Cautioner] a cautioner *judicio fisci et judicatum solvi* before the admiral, is not liberated by the death of the defender during the dependence. N° 47. The like as to a cautioner in a suspension. N° 48. A cautioner in losing arrestment has not the benefit of discussion. N° 49. Relief among co-cautioners. N° 71. What compulsion against the principal is competent to the cautioner for obtaining relief. N° 130.

Cessio bonorum] a man who is imprisoned for a sum, being an assythment for murder, has not the privilege of a *cessio bonorum*. N° 126.

Charge] distinguished from a copy of the charge, and from the execution of the charge. 148.

Citation] The form of citing defenders where a plurality are conjoined in one process. N° 87.

Clan-act] takes place with regard to heirs-apparent. 229.

Clare constat] See precept.

Clause] of registration in bonds, its history and progress. 213. 214. 215.

Commissary-court] its jurisdiction. 212. 213. It belongs to this court to authenticate tutorial and curatorial inventories. N° 110. A decree in absence for sums above *L. 40 Scots* pronounced by this court is null, as *ultra vires*. N° 111.

Common-good] administration of the common-good of burrows. 185. formerly under inspection of the chamberlain, now of the exchequer. 185. 186.

Community] the office-bearers of a corporation which has no power to borrow money, are not liable to execution for the debts that happen to be contracted. N° 24. Are private burghesses intitled to carry on a process against their

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their magistrates for malversation. N° 101. Administration of the common-good? 185.

Competent] is it competent for private burghesses to carry on a process against their magistrates for malversation? N° 101.

Compensation] when money is put into the hand of a mandatary to be applied for a certain purpose, the death of the mandant before the application intitles the mandatary to retain the money in compensation of debt due to him by the mandant. N° 54. A man obtaining possession *bona fide* of his debtor's effects, tho' by an informal pointing, is not bound to restore till he get payment of his debt. N° 66. Compensation may be proposed even after a decree, by way of retention, where the party has no other means of obtaining payment. 104.

Competition] a preferable annual-renter, from whom a part is drawn by an inhibitor, cannot recur against the posterior annual-renter to make up his loss. N° 1. A personal conveyance of a personal right to land does not denude the grantor, or bar a second conveyance; the first infestment in such a case being always preferable. N° 8. Annual-rent-rights granted by a debtor before his infestment are ranked according to their dates, as if the debtor had been first infest. N° 11.

Condition] implied in a provision to a child when it shall arrive to a certain age. N° 102.

Confirmation] what title is necessary for confirming a defunct's effects. 31.

Consent] effect in a ranking of one creditor consenting to another's preference. 2. What effect it has with respect to any right that is in the person of the consenter. N° 129. A consent when necessary to validate a title to land, must be in a writing subscribed by the consenter himself. 282.

Contract] in what particulars it differs from an offer and from a promise. 176.

Contumacy] what execution proceeds from the Court of Session against those who disobey their orders. N° 19.

Creditors of a defunct] rule of preference for creditors using legal diligence within six months of the debtor's death. N° 27. What must be done for obtaining payment where a factor is appointed by the Court to manage for the infant-children of the debtor. N° 83. Preferred before those of his heir. N° 86.

Correctory laws] ought to be liberally interpreted, otherways with respect to penal laws. 174.

D.

Damage] The transgressing a municipal statute where there is no wrong at common law, will not infer damage unless specified in the act. N° 92.

Dead's part. 91.

Death-bed] can a donator of *ultimus heres*, reduce a deed done on death-bed. N° 18. What understood to be *morbus fonticus*. N° 22. A ratification is not a deed that can be reduced as upon death-bed. N° 56. What is the nature of deeds that can be reduced as upon death-bed. 85. In a deed upon death-bed a man having settled his moveables upon his heir, an adjudication conveyed to his wife in the same deed was supported against a reduction upon the head of death-bed, the moveables being of greater value than the adjudication. N° 73.

Debtor and Creditor] a disponee to land burdened with an heretable debt, intitled to demand an assignment upon payment. N° 123.

Declarator of right] In what cases is this process necessary. 232.

Decree] where a decree is *ex facie* formal, no objection can be sustained against it but by way of reduction or suspension. 65.

Deed] words in a deed have no effect when they go beyond the intention of the grantor. N° 14.

Delivery] not necessary in transferring subjects from the dead to the living. 275. In what cases not necessary in transferring from the living to the living. See purchase.

Denization]

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Denization] letters of denization. 202.

Denunciation] where it must be executed. 71.

Desuetude] laws touching public police go not into desuetude. 195. Statutes that have lost their utility go readily into desuetude. 196.

Disposition] general disposition of moveables, what right it carries. 31. By what diligence it may be attached. 32.

E.

Edinburgh] is only *communis patria* to those who are out of the country. 71.

Evidence] of writ. 207.

Exchequer] jurisdiction of this court with respect to the common-good of burrows. 186.

Execution] in what cases is an interlocutor of the Court without extract an authority for execution N° 81. Form of charging magistrates to receive a debtor under caption. N° 89.

Executor] confirmation by an executor-creditor, or by the next of kin, vests the subjects confirmed in the executor, so as that there can be no place thereafter for a second confirmation of these subjects, as in *hereditate jacente* of the first defunct. N° 9. The nature of an executor's title. 21. 22. What are his powers. 98. An executor-testamentary is preferable before all the creditors for payment of debts where he is cautioner, and also for payment of debts due to himself. N° 62. Not liable for interest of sums uplifted. N° 79. An executor-creditor, like an executor-debtor, being a trustee only, is not liable to the risk of the goods perishing, or falling in their appraised values, but is bound to dispose upon them by auction, and to account for the price. N° 125.

Expence] given in a tentative process of reduction and improbation, where the defender produced a clear right to the estate. N° 29.

Extracters] are servants to the clerks of session, removeable at pleasure. N° 20.

F.

Factor] a man, in appointing tutors to his infant-heir, may also name a factor for levying the rents. N° 38. Where a factor is appointed by the Court of Session for managing the effects of infants, in what manner can the factor be made liable to creditors. N° 83.

Feodum pecunie. 170.

Feudal-holding] its nature. 128. 272. 273. 274.

Fiar] where a lease is taken to husband and wife, and the survivor, and the representatives of the survivor, who is fiar. N° 113.

Foreign] against a suit here for payment of a promissory note contracted in England, the defence was sustained, that the debt was extinguished by the English prescription of six years. N° 16. Foreign statutes have no statutory authority *extra territorium*. 30. What effect is given here to foreign statutes. 30.

Forfeiture] what relief is afforded to creditors by the treason-laws since the union. N° 119.

Funeral expence] a wife's funeral expence must come out of her own fund. N° 80.

G.

General Service] it is of no consequence whether a service be as heir of provision, or as heir of line, provided the subject be specified in the service N° 107. A general service is a late invention in our law. 205.

Glebe] Kirk-lands nearest the manse being allocated for the minister's grafts, against whom has the heretor relief. N° 63.

Heir]

I N D E X.

H.

Heir] cannot dispoſe the eſtate in prejudice of his predeceſſor's creditors, for a year after the ſucceſſion opens to him. N° 86. The maxim in the *Roman* law that a man cannot name an heir to his heir, obtains not with us. 26.

Heir-apparent] form of making up titles in his perſon. N° 128.

Heir-apparent three years in poſſeſſion] the benefit given to his creditors by act 1695, is not extended againſt the next heir who poſſeſſes only, and obtains from making up titles to a remoter predeceſſor. N° 23.

Heir *cum beneficio*] muſt ſubmit to a ſale of the eſtate, if the creditors chuſe that method for their payment. N° 7.

Heirs-portioners] in what manner feu-ſuperiorities are to be divided among them. N° 57.

Heretable and moveable] of corn and artificial graſſes growing at the proprietor's death, what goes to the heir, and what to the executor. N° 60. Corns ſown after the proprietor's death belong to the heir. 96. Heretable and moveable, *quoad* huſband and wife. N° 96.

Heretor] what power the heretors have in managing the funds of the poor. N° 121.

Holding as confeſt. 35.

Horning] an adjudication pronounced by the ſheriff, not a foundation for a horning againſt the ſuperior. N° 34.

Huſband and wife] the wife's funeral expence muſt be defrayed out of her own fund. N° 80. Where a man dies before the term of payment, the bond falls under *jus relictæ*. N° 96. What rights are rendered ineffectual by diſſolution of the marriage within year and day. N° 122.

Hypothec] a tenant's goods pointed and carried off, cannot be recovered *via facti* by the maſter upon his hypothec. N° 67. When the rent is payable in kind, a creditor cannot point the tenant's corns till he firſt ſet aſide as much as will be ſufficient for the rent. N° 90. The nature of an hypothec upon corn. 149.

I.

Implied condition] in a proviſion to a child when it ſhall arrive to a certain age. N° 102.

Infeſtment] The different means by which an infeſtment is extinguished. N° 68.

Inhibition] it's nature. 2. What effect it ought to have in a ranking. 2. An inhibition being executed againſt the debtor in the ſhire where he reſided at the time, ought to be executed againſt the lieges in the ſame ſhire. N° 74. Where a ſum is drawn by an inhibitor, whether does it affect the poſterior annualrenters equally, or the laſt only. N° 78. Nature of an inhibition. 119. Effect of an inhibition. 120. Upon a contract of marriage what effect it has. 152.

Intimation] Where the debtor concurs in the aſſignment, intimation is unneceſſary. N° 124.

Joint-tenancy] diſtinguiſhed in the law of *England* from a right of co-partnery. 228.

Juriſdiction] The commiſſary-books are a competent register for bonds, bills, &c. without limitation of ſums. N° 109. Prorogation of juriſdiction explained. 221. Juriſdiction prorogated by conſent of parties. 223.

Jus quaſitum tertio] bills blank indorſed delivered by the drawer to his friend, for the uſe of his, the drawer's creditors, remain the property of the drawer till they be delivered to the creditors. N° 5. The like. N° 50.

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Jus relictæ] See husband and wife.

Jus superveniens auctori accrescit successori] explained. 281.

K.

Kirk-session] What power the kirk-session has in managing the funds of the poor. N° 121.

L.

Land] lock'd up by the feudal law was restored by degrees to commerce. 129. 130. A promise in writing to dispoſe land is binding in law. N° 98.

Legitim] a testamentary ſettlement of the teſtator's moveables to his only ſon an infant, with a ſubſtitution to the teſtator's relict, which takes effect by the ſon's death in his minority, does not bar the ſon's next of kin from claiming the legitim. N° 28. Nature of the legitim. 45.

Liferent] in what caſes a liferent ſubſiſts after the liferented houſe is demolish'd. N° 26. A ſum provided for the wife's liferent in a contract of marriage, is not attachable by the husband's creditors, even tho' they offer ſecurity to make the liferent effectual. N° 41.

Locality] a decree of locality ſubjects the heretor perſonally to the ſtipend lo- called upon his land. N° 31.

Locus penitentiæ] with reſpect to bargains that are to be perfected by writ. 207

M.

Magiſtrates] in what manner they are liable for the debts of the town. 38. 39.

Messenger] againſt the nomination of a meſſenger by the Lord Lion it is not competent to complain directly to the Court of Seſſion. N° 55. The number of meſſengers to ſerve within the ſhire of *Edinburgh* is by ſtatute limited to twenty four. The Lion, heralds, and purſevants are not comprehended in that number. 84.

Miniſter's graſs] See glebe.

Minor] the maxim that minor *non tenetur placitare ſuper hereditate paterna*, explained. N° 85.

Minority and leſion] a debtor having died in apparency, and decreets of conſtitution and adjudication being deduced againſt his infant-ſon, charged to enter heir without renouncing, how far is ſuch a diligence reducible upon minority and leſion. N° 97.

Money] is not ſubject to any *vitium reale*, and cannot be vindicated from the *bona fide* poſſeſſor, however clear the proof of the theft may be. N° 105.

Mortuus ſaſit vivum. 133. 275.

Moveable eſtate] hiſtory of moveable ſucceſſion. 90. &c.

N.

Neareſt of kin] a confirmation of any part veſts the whole moveable eſtate in the next of kin. N° 59. But no right is veſted by a decree-dative without confirmation. N° 64.

Non repugnantia.] 280.

O.

Obligation] what obligations go to heirs. 191.

Offer] in what particulars it differs from a promiſe, and from a mutual contract. 176.

Offices] may be attached for payment of debt. N° 82.

Pactum

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P.

Pactum illicitum. 4. N° 30.

Papist] What method is competent to the protestant-heir to follow out his claim. N° 69. When a papist is served and infest, what is the nature of his right. 230.

Parliament] a nominal and fictitious estate created for voting. N° 75.

Patria potestas] which impowers a man to name tutors to his infant-children, impowers him also to name a factor for them. N° 38.

Peer] by what means a peer can be compelled to give his testimony as a witness. 284.

Personal and real] a disposition with the burden of debts contained in a list referred to in the disposition, does not make these debts a real burden, unless the list be recorded in the register of sasines. N° 10.

Personal and transmissible] the office of principal usher to the parliament is adjudgeable. N° 82. The privilege of superintending the elections of a royal burrow may be carried by adjudication. N° 104.

Personal execution] upon what foundation it rests. 266. 267. 268.

Pluris petitio] what effect it has upon an adjudication. N° 127.

Poin ding] nature and effect of a poinding. 104. A poinding may proceed upon a charge for payment that is more than year and day before the poinding. N° 117.

Popular action. 184.

Precept of *clare constat*] what deeds are reckoned equivalent to it. N° 128.

Prescription] analysis of the act 1695, introducing the septennial prescription of cautionry-obligements. N° 35. Actions are cut off by prescription, but not exceptions or objections. 64. The positive prescription of 40 years takes place with respect to tacks of teinds. N° 76. Whether a right to teinds can be lost by the negative prescription. N° 112.

Prisoner] a magistrate having received the debtor from the messenger, and suffered him to escape without putting him in jail, the town is liable for the debt. N° 88.

Procuratory of resignation] explained. 276. 277.

Promise] in what particulars it differs from an offer, and from a mutual contract. 176. A promise in writing to dispo ne land is binding in law. N° 98.

Proof] by witnesses to supply a clause omitted in a deed. N° 58. Compensation proposed by the arrestee in a process of furthcoming, can be proved by the oath of the common debtor, tho' bankrupt. N° 70. The reason why the cedent's oath is not good against an onerous assignee. 109.

Property] I cannot touch my neighbour's property, whatever benefit the alteration may produce to me. N° 52. Consequential damage to a neighbour cannot restrain me in the use of my property. 80. No person ought to act in *emulationem vicini*. This maxim explained. 80. A proprietor may lay hold of his goods *via facti*, even from a *bona fide* purchaser, but not if they be poinded. 104. 105. Where a man can claim the property upon different titles, it is sufficient that he establish his right upon any one of these titles. 279.

Prorogation of jurisdiction] explained. 221. Jurisdiction prorogated by consent of parties. 223.

Protestation] nature and effect of a protestation in a suspension. 67. 68.

Provision to heirs and children] in what cases a service is necessary. N° 25. A settlement in a contract of marriage is *in dubio* not understood to give more to the heirs *nascituri*, than *spes successionis*. N° 91.

Purchase] what solemnity is necessary for transferring land to a purchaser. 236. What for transferring rights affecting lands 237. What for transferring *nomi-*

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na debitorum. 237. What for transferring tacks. 237. What for transferring the bygone interest of an heretable bond. 262.

Q.

Quadriennium utile. 64.

Qualification] nominal and fictitious qualification. N° 75.

Quot. 91.

R.

Ranking] rules for determining what the creditors are to draw in a ranking. 3.

Ranking and sale] it is sufficient for a process of sale that the estate is bankrupt, tho' the proprietor be not. 15.

Records] it does not hold that one who purchases upon the faith of the records, is secure. 19.

Registration] what courts are competent for decreets of registration. 213. 214. 215.

Relief] among co-cautioners. N° 71.

Remission] what are the conditions upon which it may be granted. 268.

Renovatio feudi. 128. 132.

Renunciation] a renunciation recorded, extinguishes an infestment of annual-rent. 105. 106.

Renunciation to be heir] explained. 276.

Reparation] the transgressing of a municipal statute, by doing what is not wrong at common law, will not found a claim for reparation, unless specified in the act. N° 92. Reparation awarded to a young woman against the man who had corrupted her. N° 100.

Right in security] tho' the debt be lessened by payment, the security is not; but remains as extensive as originally, till the last shilling be paid. N° 6. Right in security by infestment preferred before arresters of the rent. N° 94. Nature of a right in security. N° 115. Infestment granted for security of money cannot be effectual beyond the money actually advanced. N° 115.

S.

Service] in what cases it is necessary to heirs of provision in a contract of marriage. N° 25. In what cases a service as heir of provision is necessary. N° 32. Service is not necessary in dignities and offices. 132.

Servitude] long possession of a servitude of pasturage, supplies the want of a title, because it presumes that the possession has commenced upon a grant from the proprietor. 7. The like as to servitude of dry multures. 7. A servitude burdening the fee by prescription, is effectual against the superior. 7. Personal servitude acquired by prescription. 9. Whether it be essential to a real servitude that it be *utile prædio*. 10.

Society] unlawful society. N° 2.

Statutes] that have lost their utility go readily into desuetude. 196.

Stock] a partner's stock in a trading company is attachable by arrestment. N° 33. Nature of a partner's stock in a trading company. 51.

Substitute and conditional institute] a proper substitution is *in dubio* presumed, and not a conditional institution. N° 13. 49.

Substitution] The difference between our substitutions and those of the *Romans*. 26.

Succession] history of moveable succession. 90. &c.

Surrogatum]

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Surrogatum] a bond taken by an executor as the price of the defunct's effects, is still understood to be a *surrogatum* to which the next of kin of the defunct have right. N° 51.

Suspension] its nature and effect. 66. 67.

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